FOR ARGUMENT

Supreme Court, U.S.
FILED
JUL 27 2000
OFFICE OF THE CLERK

No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

APPENDIX TO BRIEF OF THE SERRANO WATER DISTRICT; THE IMPERIAL IRRIGATION DISTRICT; THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT; THE RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT; THE WESTERN COALITION OF ARID STATES; THE WESTERN GROWERS ASSOCIATION; TEJON RANCH; AND THE FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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July 27, 2000

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- Letter from Peter J. Offringa, Brigadier General, Deputy Director of Civil Works, U.S. Army Corps of Engineers, to David G. Davis, Director, Office of Wetlands Protection, EPA (Oct. 30, 1987) (enclosing *Draft Guidance for Clean Water Act Jurisdiction Over Isolated Waters*).

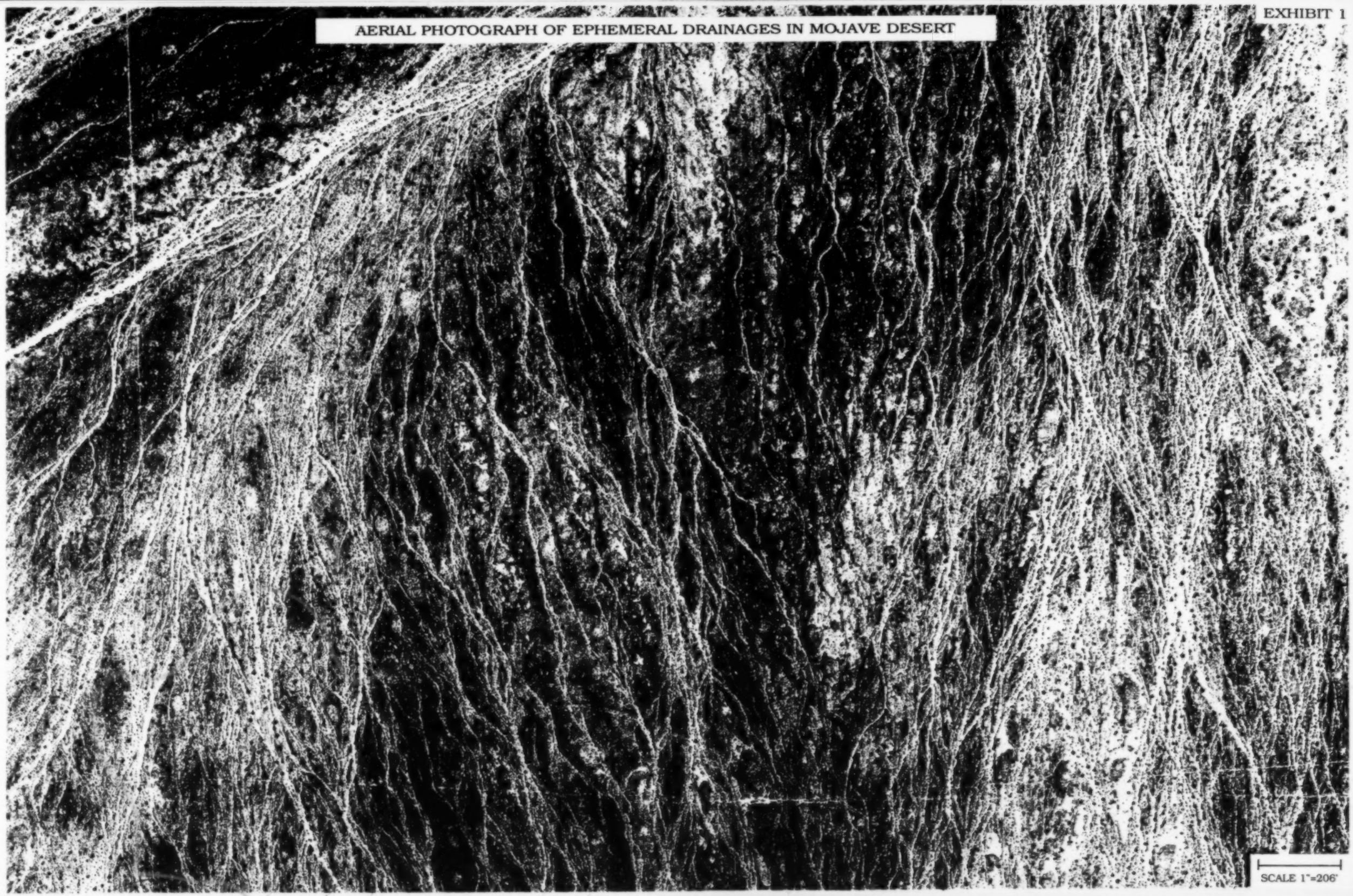
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EXHIBIT 1

AERIAL PHOTOGRAPH OF EPHEMERAL DRAINAGES IN MOJAVE DESERT



Figures 1 and 2: Jurisdictional Drainage in Ventura County, California; and Jurisdictional Desert Wash near Palm Springs, California





Figures 3 and 4: Jurisdictional Desert Wash near Desert Springs, California; and Jurisdictional Drainages within Eroded Canyons between Rolling Hills in San Clemente, California



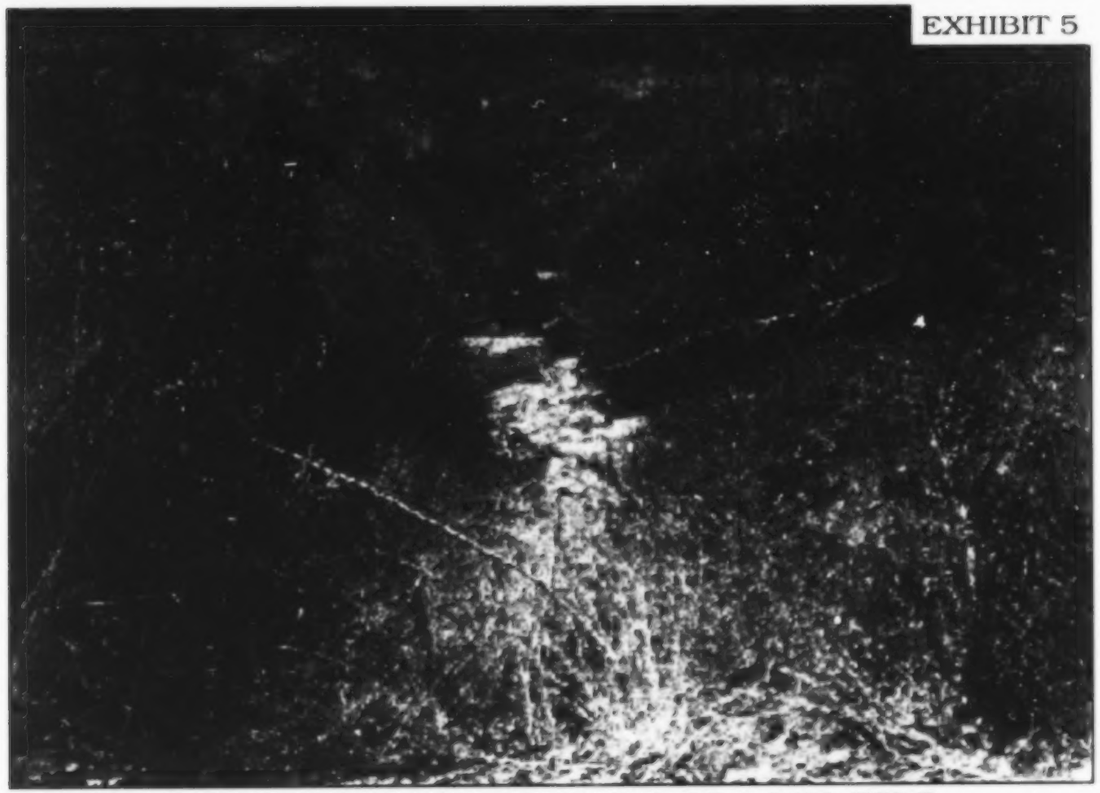


CORPS DELINEATION IN ORANGE COUNTY, CALIFORNIA



SCALE 1"=200'

EXHIBIT 5



GROUND-LEVEL PHOTOGRAPHS OF 1-2 FT. WIDE
JURISDICTIONAL EPHEMERAL DRAINAGES IN EXHIBIT 4

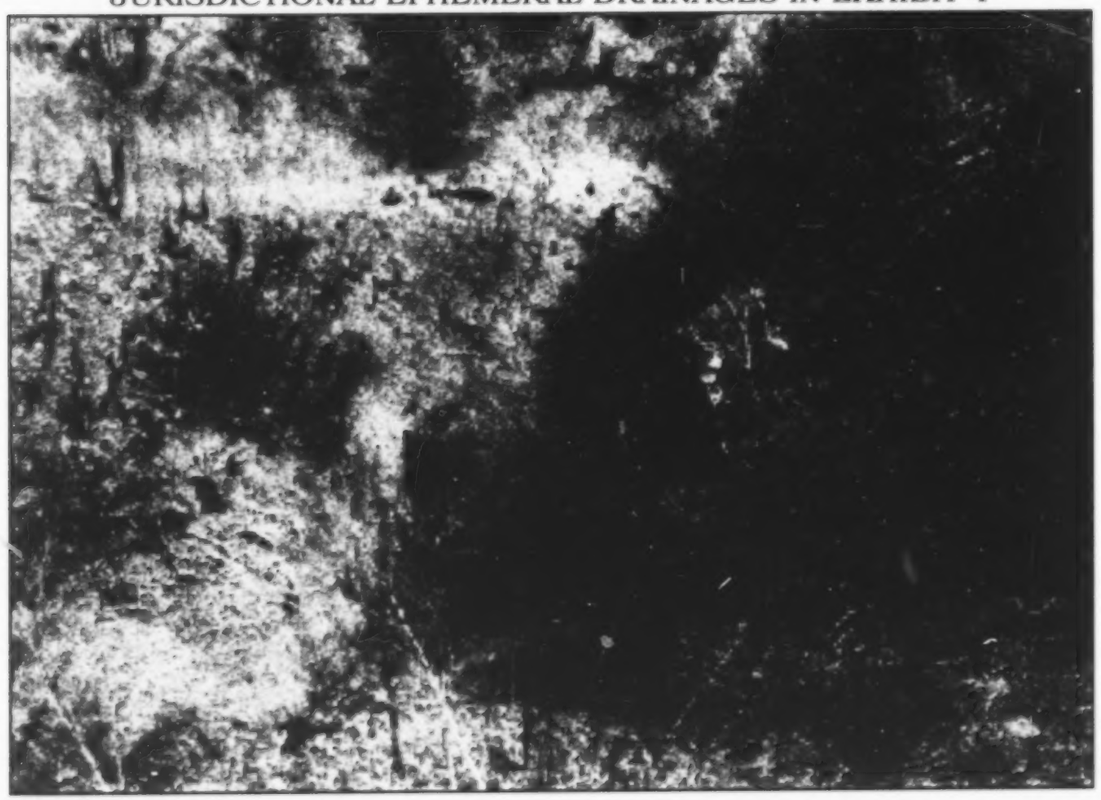
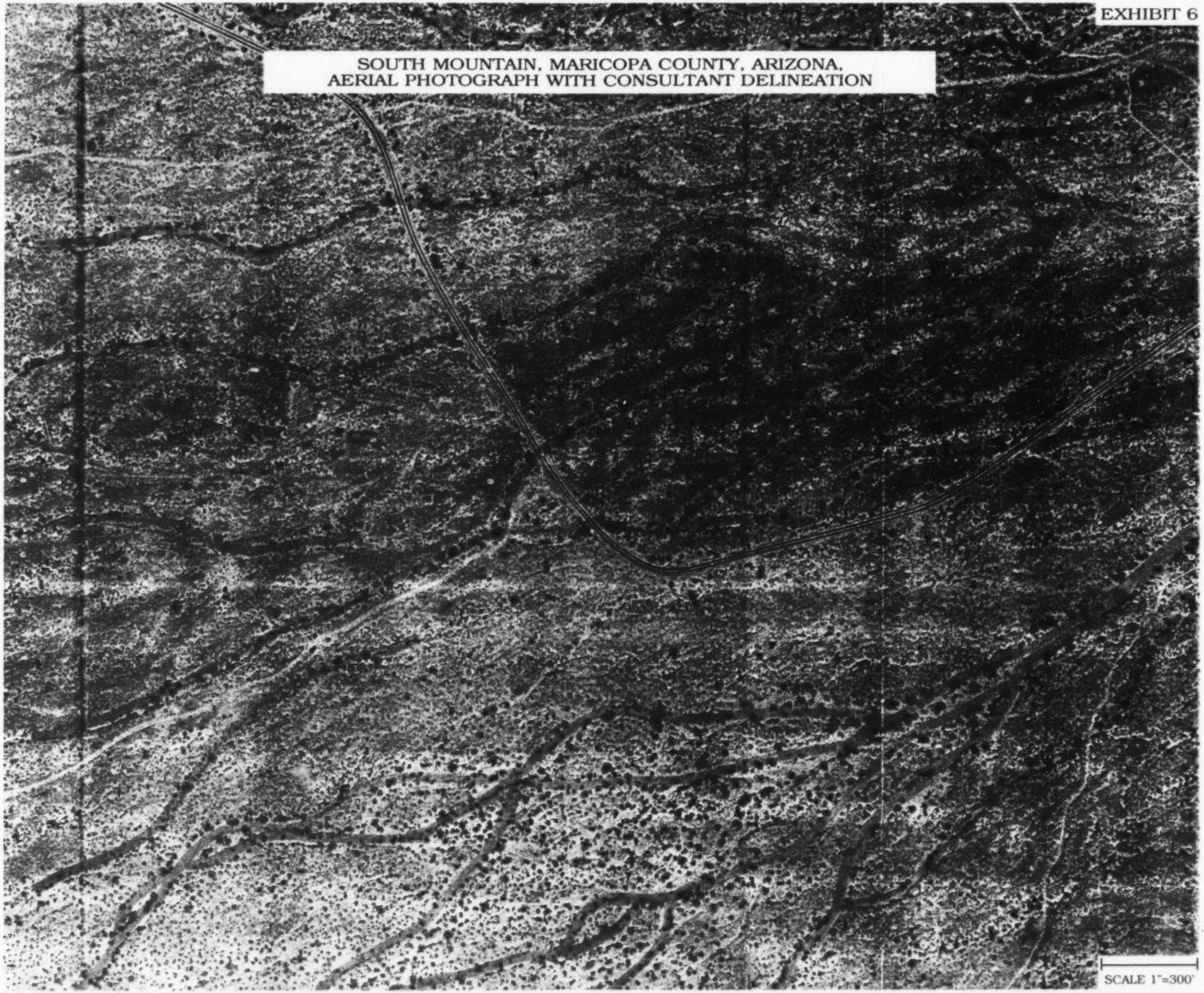


EXHIBIT 6

SOUTH MOUNTAIN, MARICOPA COUNTY, ARIZONA,
AERIAL PHOTOGRAPH WITH CONSULTANT DELINEATION



SCALE 1"=300'

EXHIBIT 7



GROUND-LEVEL PHOTOGRAPHS OF 40 FT. WIDE EPHEMERAL DRAINAGE IN EXHIBIT 6



Wash Flow And Rainfall Data For Maricopa County, Arizona*

July 2000

Wash Name	Location	Approximate Watershed Size in Square Miles	FCDMC Rainfall Gauge Number (1)	FCDMC Wash Flow Gauge Number (2)	Period of Measurement	Total Number of Flow Events During the Period of Measurement (3)	Average Depth of Flow Per Event in Feet	Average Total Elapsed Flow Time Per Event in Hours	Estimated Jurisdictional Width of Wash in Feet	Total Number of Rain Events During the Period of Measurement (4)
South Mountain Fan	Phoenix, AZ	2.3	6560	6563	6/9/93 to 7/10/00	5	1.7	1.4	40	182
Estrella Fan	Goodyear, AZ	1.1	6890	6893	4/30/93 to 7/10/00	4	0.4	N/A	70	203
North Heights Dam	Fountain Hills, AZ	1.9	5980	5983	10/11/96 to 7/10/00	15	N/A	N/A	30	120
Flying E Wash	Wickenburg, AZ	8	7080	7083	7/12/94 to 7/10/00	39	0.9	N/A	N/A	198

* Prepared by Jack Moody, PE, Arizona Registration No. 22208, from Flood Control District of Maricopa County records.

(1) Rainfall gauges are located near the wash gauges.

(2) Wash flow gauges are located in the low-flow channel of the wash and maintained by the FCDMC.

(3) All wash flow events as small as 1.2 inches deep are recorded, and the data are transmitted electronically to the FCDMC.

(4) A "rain event" is defined as a single rainfall measuring 1 millimeter (0.04 inches) of rain or greater over a 24-hour period. On average, there are 37 additional rainfall events each year that have less than 1 millimeter (0.01 to 0.03 inches) of rain.

EXHIBIT 8

EXHIBIT 9

DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT, CORPS OF ENGINEERS
ARIZONA-NEVADA AREA OFFICE
3636 NORTH CENTRAL AVENUE, SUITE 760
PHOENIX, ARIZONA 85012-1936

REPLY TO
ATTENTION OF

Office of the Chief
Regulatory Branch

November 1998

File Number:

Dear Mr.

Reference is made to your letter of , in which you inquired as to the jurisdictional limits of Section 404 of the Clean Water Act for

The Section 404 jurisdictional limits are indicated by the ordinary high water mark and/or wetland boundary designated on the enclosed aerial photograph or map. This jurisdictional determination will remain in effect for five years from the date of this letter unless an unusual flood event occurs. After this five year period or after an unusual flood event alters stream conditions, the Corps of Engineers reserves the authority to retain the original jurisdictional limits or to establish new jurisdictional limits as conditions warrant.

Although your delineation has been completed, we would ask that on future requests, in addition to a proposed delineation, you include two unmarked copies of a recent vintage aerial photograph. Preferably the aerial photograph scale should be a minimum of 1":100' and should accurately depict the current field conditions. The project area boundary should be marked on the photograph, but the waterways should not be obscured by any marks. I am enclosing a copy of our "Minimum Requirements for Obtaining a Section 404 Clean Water Act Delineation" for your future reference.

Any discharge of dredged or fill material within the designated jurisdictional area requires a permit from the Corps of Engineers under Section 404 of the Clean Water Act. The Corps of Engineers emphasizes avoidance of the delineated jurisdictional area. Please review this delineation and evaluate your proposed activity to ensure that avoidance of the jurisdictional area is given full consideration in your design. Any work outside the designated jurisdictional area does not require a Section 404 permit.

Please include a copy of this letter and the corresponding jurisdictional delineation with any application to the Corps of Engineers for a Section 404 permit.

The receipt of your letter is appreciated. If you have questions, please contact .

Sincerely,

Chief, Arizona Section
Regulatory Branch

Enclosure(s)

Project Name:
Location:
Project Number:
Engineer: Date:

TABLE 1
Jurisdictional Waters of the U.S.

Description	Measured L, inches	Avg Width ft	Length ft	Area ft²	Area acres
Sheet 1	4.5	50	900	45,000	1.03
	14.3	6	2,860	17,160	0.39
	2	4	400	1,600	0.04
	3.7	3	740	2,220	0.05
	45.8	15	9,160	137,400	3.15
	8	4	1,600	6,400	0.15
	14	3	2,800	8,400	0.19
	1.8	3	360	1,080	0.02
	7.3	3	1,460	4,380	0.1
	8.3	3	1,660	4,980	0.11
	3.8	5	760	3,800	0.09
	11.5	6	2,300	13,800	0.32
	3.7	15	740	11,100	0.25
Sheet 2	8.75	8	1,750	14,000	0.32
	8.1	15	1,620	24,300	0.56
	7.5	12	1,500	18,000	0.41
	6.7	10	1,340	13,400	0.31
	5.5	8	1,100	8,800	0.2
	3.25	3	650	1,950	0.04
	6.5	3	1,300	3,900	0.09
	3.9	3	780	2,340	0.05
	11.6	25	2,320	58,000	1.33
	19.4	20	3,880	77,600	1.78
	8.4	15	1,680	25,200	0.58
	2.9	6	580	3,480	0.08
	6.3	4	1,260	5,040	0.12
	2.75	3	550	1,650	0.04
	19.8	8	3,960	31,680	0.73
	0.75	3	150	450	0.01
	1.5	12	300	3,600	0.08
	0.5	10	100	1,000	0.02
	3.3	6	660	3,960	0.09
Sheet 3	2.8	3	560	1,680	0.04
	6	8	1,200	9,600	0.22
	4.8	6	960	5,760	0.13
	15.5	8	3,100	24,800	0.57
	7	4	1,400	5,600	0.13
	3.5	10	700	7,000	0.16
	11.4	6	2,280	13,680	0.31
	8.75	4	1,750	7,000	0.16
	17	5	3,400	17,000	0.39
	17	3	3,400	10,200	0.23
	11.25	5	2,250	11,250	0.26

Total Jurisdictional Waters of the U.S.: 15.33

885 F.2d 866 (Table)
30 ERC 1510, 20 Envtl. L. Rep. 20,008
Unpublished Disposition
(Cite as: 885 F.2d 866, 1989 WL 106990 (4th Cir.(Va.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the publication and citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.

TABB LAKES, LTD., a Virginia corporation, Plaintiff-Appellee,
v.
UNITED STATES of America, Henry E. Hudson, United States Attorney, Lee M. Thomas, Administrator, Environmental Protection Agency, James M. Seif, Administrator, Environmental Protection Agency, John O. Marsh, Jr., Secretary of the Army, Elvin R. Heiberg, III, Chief, Army Corps of Engineers, Charles E. Williams, North Atlantic Division Engineer; J.J. Thomas, Norfolk District Manager, Defendants-Appellants.

No. 89-2905.

Argued July 24, 1989.
Decided Sept. 19, 1989.
E.D.Va., 715 F.Supp. 726.

AFFIRMED.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, Senior District Judge. (CA-87-635-N)).

David Carlisle Shilton (Donald A. Carr, Acting Assistant Attorney General, Dirk D. Snel, Michael D. Rowe, Department of Justice, Russel Petit, Office of Chief Counsel, U.S. Army Corps of Engineers, Dov Weitman, Office of General Counsel, U.S. Environmental Protection Agency on brief) for appellant.

Richard Russell Nageotte (Nageotte & Borinsky, P.C. on brief) for appellee.

Before DONALD RUSSELL, WIDENER, and K.K. HALL, Circuit Judges.

PER CURIAM:

**1 This is an action for a declaratory judgment by a landowner that his property located in York County, Virginia is not within the coverage of Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1251, et seq. The plaintiff moved for summary judgment on the pleadings and submitted affidavits in support. The ground of its motion was that under the Act the defendants had no jurisdiction over its land. The defendants, on the other hand, moved for summary judgment on the ground that jurisdiction under the Act was evident. The district court, in an excellent opinion, denied the defendants' motion for summary judgment and sustained that of the plaintiff's. The defendants have appealed.

The CWA is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In discharge of this responsibility the Act prohibits the discharge of pollutants into the Nation's waters. Included in this responsibility was "an interim goal of water quality which [would] provide[ ] for the protection and propagation of fish, shellfish, and wildlife ... by July 1, 1983." To accomplish the broad purposes of the Act, it was said to be "essential that discharge of pollutants be controlled at the source." Accordingly, the Act in 33 U.S.C. § 1344 provided for a permit program for the discharge of dredged or fill material into "navigable waters" and devolved the responsibility of developing and administering such program on the Corps of Engineers. The statute defined "navigable waters" as "waters of the United States" without any more specific identification of the term. Initially, the Corps of Engineers construed the Act as covering only waters navigable in fact. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123. Responding to complaints from environmentalists, the Corps finally in 1983, issued regulations defining "waters of the United States" in these words:

(3) All other waters such as intrastate lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs,

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prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce....

Congress became concerned that there was no specific provision protecting migratory birdlife. After considerable discussion between Congressional leaders and the agency, General Kelly, acting on behalf of the Department and Corps, issued a letter in the form of a directive to all officers of the Corps of Engineers, in which he specified, among others, this new standard for indicating as sufficient interstate commerce connection to warrant exercise of jurisdiction in the Corps over isolated waters and wetlands. This new identifying standard was:

**2 Waters which are used or could be used as habitat by other migratory birds which cross state lines.

The issue posed by this appeal is whether this added provision is of a character requiring prior notice and opportunity for comment under 5 U.S.C. § 553 before it becomes valid. The resolution of that issue, as the parties concede, depends on the determination whether the Memorandum issued by General Kelly in behalf of the Secretary and Commanding General of the Corps qualifies as an interpretative rule or general policy statement as under the recognized exception to the requirements of Section 553 of prior notice and opportunity to respond. See Section 533(b)(3)(A). The district court carefully reviewed this issue and concluded that the exception did not apply and that the Kelly Memorandum represented a new material addition to the coverage of the Clean Water Act requiring prior notice and opportunity to comment. See also Jerri's Ceramic Arts v. Consumer Product Safety Comm., 874 F.2d 205 (4th Cir.1989). It accordingly granted the landowner's petition for a declaratory judgment to that effect and entered judgment accordingly. We affirm on the district court's opinion. Tabb Lakes, Ltd. v. United States of America, C/A No. 87-635-N (E.D.Va. Nov. 7, 1988).

AFFIRMED.

K.K. HALL, Circuit Judge, dissenting:

I agree with the majority that the only issue of this appeal is whether or not the Corps' new provision regarding the use or potential use of waters by migratory birds meets the interpretive rule exception to 5 U.S.C. § 533(b)(3)(A). Because I believe that it does, I respectfully dissent.

Section 553 of the Administrative Procedures Act ("APA") creates an exception to the APA's requirement of notice-and-comment rule-making for rules which are merely "interpretive." 5 U.S.C. § 533(b)(3)(A). While the application of this exception has led to much judicial consternation, there is general agreement that rules which are explanatory and "simply state what the administrative agency thinks the statute means" fit the exception. Jerri's Ceramic Arts v. Consumer Products Safety, 874 F.2d 205, 207 (4th Cir.1989). Conversely, rules which implement a statute and create new legal obligations are substantive and must be promulgated pursuant to the notice-and-comment procedures of the Act. United Technologies Corp. v. E.P.A., 821 F.2d 714, 718-20 (D.C.Cir.1987). Although recognizing these principles, the district court found the provision in question to be substantive largely because it had a "significant effect on public interests." This holding is in error.

The significance of a rule's impact has no place in the determination of whether it is substantive or interpretive. See American Postal Workers Union, AFL-CIO v. U.S. Postal Service, 707 F.2d 548, 560 (D.C.Cir.1983), citing 2 K. Davis, Administrative Law Treatise, § 7:8 at 39 (2d Ed.1979). The touchstone of a substantive rule is its creation of new legal obligations. This the Corps' migratory bird provision does not do.

**3 The majority's holding to the contrary notwithstanding, this regulation did not impose new legal obligations by expanding jurisdiction under the Clean Water Act ("CWA"). 33 U.S.C. § 1251 et seq. CWA coverage was set by Congress and

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extends to all "waters of the United States." 33 U.S.C. § 1362(7). The Corps could not have expanded on this definition for the simple reason that Congress intended that the statute be given "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S.Conf.Rep. 1236, 92nd Cong., 2d Sess. 144 (1972); 1 1972 Legislative History at 281, 327. This regulation merely explains the Corps' interpretation of what contacts with interstate commerce are sufficient to bring a given wetland within the jurisdictional reach of the CWA. Furthermore, under the CWA, the Corps does not have the authority to promulgate rules affecting its jurisdiction. Consequently, even if the Corps wanted to promulgate a substantive rule on this point, [FN1] it could not. See Postal Workers, 707 F.2d at 558. (A rule cannot possibly be substantive unless an agency has been delegated authority to promulgate such a rule.)

FN1. As we have previously noted, in deciding whether a given rule is interpretive, the agency's intent should be considered. Jerri's Ceramics, 874 F.2d at 208. Here it is clear that the Corps intended this regulation to be interpretive. When it was published in the Federal Register, the Corps made clear that its purpose was to "clarify" the definition of "waters of the United States" so as to "clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." 51 Fed.Reg. 41217. Plainly, the Corps intended the rule to be nothing more than an explanation of present practices.

For the above-stated reasons, I conclude that the migratory bird provision is an interpretive rule that is exempt from the notice-and-comment procedures of the APA. Consequently, the Corps properly relied upon it in determining that it had jurisdiction over the Tabb Lakes property. Accordingly, I would reverse the district court on this point and remand for further proceedings on the merits of the jurisdiction issue. [FN2] Because the majority fails to do this, I dissent.

FN2. In this regard, the record shows that Tabb Lakes' property is not used by migratory water fowl such as ducks or geese, but rather, indicates the presence of migratory robins and finches. On remand, the district court should determine whether the use or potential use of the property by these types of birds provide a sufficient nexus between the property and interstate commerce to bring it within CWA jurisdiction. I am doubtful that it does; however, this is a close question. It is also a question that involves issues of fact appropriate for the district court in the first instance.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 30

In the matter of National Pollutant Discharge Elimination System permit for City of Ely, Nevada, Docket No. 141-24(w), the Presiding Officer has certified an issue of law to the General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

Whether the discharge from the City of Ely, Nevada sewage treatment plant into Murry Creek constitutes a discharge into "navigable waters" as that term is defined in §502(7) of the Federal Water Pollution Control Act.

Answer

Based upon the facts presented in the stipulation agreed to by EPA's Regional Office, Region IX, and the City of Ely, 1/ the discharge in question is not a discharge into "navigable waters."

Discussion

The term "navigable waters" is defined in Section 502(7) of the Federal Water Pollution Control Act as "waters of the United States,

1/ A copy of the stipulation is attached as an appendix to this Decision.

including the territorial seas." That term was explained in an earlier opinion of this office as meaning "that pollution of waters covered by the bill must be capable of affecting interstate commerce". EPA, A Collection of Legal Opinions, Vol. I at 295 (1975). 2/ This basic test was elaborated somewhat in 40 C.F.R. §125.1(o):

> (o) The term "navigable waters" includes:
>
> (1) All navigable waters of the United States;
>
> (2) Tributaries of navigable waters of the United States;
>
> (3) Interstate waters;
>
> (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
>
> (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and

2/ See Leslie Salt v. Froehlke, 7 ERC 1311, 1314 (N.D. Cal. 1974):

> We conclude that the Congress, enacting the FWPCA, was exercising its powers under the commerce clause to combat pollution of the nation's waters; that water pollution unquestionably affects interstate commerce and that, therefore, it was a proper exercise of the commerce power to require permits for dredging or filling which are potential causes of pollution of waters of the United States . . . .

Accord, United States v. Holland, 6 ERC 1388, 1392-93 (M.D. Fla. 1975); of course, the statute does not require proof that "a particular discharge or stream has a discernable [sic] interstate effect." United States v. Ashland Oil, 6 ERC 1991 (W.D. Ky. 1973) aff'd, 504 F. 2d 1317, 7 ERC 1114 (6th Cir. 1974). The possibility of such an effect is sufficient.

> (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by interstate commerce.

This definition is inclusive rather than exclusive. Accordingly, there may be "waters of the United States" which are not specifically included within its scope. However, the definition provides a useful starting point.

The relevant facts are as follows: the City of Ely operates a sewage treatment plant on the Georgetown Ranch, north of Ely, Nevada. The plant discharges into Murry Creek, which is directed into irrigation ditches immediately downstream from the discharge plant. Under normal conditions, no water from the irrigation ditches leaves the Georgetown Ranch, and is unlikely to do so even during snowmelt or heavy rainfall. There is nothing in the stipulation to indicate that even were any water to flow off of the Georgetown Ranch property during such an event it would thereafter enter another body of water. Occasionally, part of Georgetown Ranch is leased to farmers for cattle grazing, and cattle from Utah have grazed on the ranch and subsequently been returned to Utah.

None of the tests in 40 C.F.R. §125.1(o) appear to be met by this factual situation. The facts indicate that Murry Creek is not navigable in fact, nor is it a tributary of any waters, navigable or otherwise. It crosses no State lines. The Stipulation does not indicate that fish or shellfish are present in Murry Creek or if so, that they are taken from the Creek and sold in interstate commerce. The waters

downstream of the discharge point are not used for any industrial purpose. 3/ Finally, I do not think that cattle from Utah are the sort of "interstate travelers" the regulation drafters had in mind, even were they (the cattle) to refresh themselves regularly with draughts of City of Ely sewage effluent.

Apart from the regulation, it could be argued that the pasturage of interstate cattle could affect commerce. While this possibility exists, the potential effect is remote indeed. More importantly, this argument ignores the character of the irrigation network as a land disposal system. All the effluent from the plant is contained entirely on the Georgetown Ranch, which appears to be owned by the City of Ely.4/ If

3/ A number of the facts in the stipulation relate to the character and uses of Murry Creek upstream from the discharge point. These facts are irrelevant to the legal determination because, except in stagnant water (which Murry Creek is not), discharges of pollutants do not affect commerce upstream from the discharge point. Thus our decision here is confined to the discharge in question and the portion of Murry Creek downstream of that discharge. We express no opinion as to the legal status of Murry Creek from its origin to its entry onto the Georgetown Ranch property.

4/ The fact that ownership of land surrounding a body of water is consolidated in one legal entity is not in itself dispositive of the issue of whether that water constitutes "waters of the United States" within the meaning of Section 502(7). What is significant here is that the water is contained on the property (i.e., there is no discharge from the water on the Georgetown Ranch to another stream or lake) and the absence of any of the uses of the water described in 40 C.F.R. §125.1(o)(4), (5) or (6).

the Utah cattle were sufficient to turn this irrigation/land disposal scheme into navigable waters, then by analogy, if a farmer allowed fishermen from another State to fish his small farm pond, the pond would become "navigable waters." Although EPA should give the term "navigable waters" its "broadest possible constitutional interpretation",5/ neither law nor reason supports extension of that term to cover these facts.

Dated: SEP 18 1975

General Counsel

5/ Conference Rept. on S.2770, Rept. No. 92-1236, 92d Cong., 2d Sess, at 144 (1972).

GENERAL COUNSEL OPINION
No. 77-5

April 21, 1977

Cooling Ponds as Navigable Waters

Federal Water Pollution Control Act — Cooling ponds as "navigat waters" — Artificial ponds built for cooling and located on property of utility are "cooling ponds," whether or not used for recreational pu poses — Effluent limitations guidelines apply only to cooling pon which are navigable waters; where use of pond is limited to residents State, then pond is not "navigable waters" and limitations do not appl — If in the future pond is used by interstate travelers, pollutant discharged therein would fall under Section 502(12) and therefore woul be subject to NPDES permit requirements under Section 402 of the Act

This is in response to your letter of September 15, 1976 as well as letter of January 10, 1977 to Mr. Stanley W. Legro, concerning the G cooling Pond. I sincerely apologize for not having answered your sooner.

EPA regulations concerning both NPDES permits and effluent limit guidelines define "navigable waters" as follows:

> The term "navigable waters" includes:
>
> (1) All navigable waters of the United States;
>
> (2) Tributaries of navigable waters of the United States;
>
> (3) Interstate waters;
>
> (4) Intrastate lakes, rivers, and streams which are utilized by in state travelers for recreation or other purposes;
>
> (5) Intrastate lakes, rivers, and streams from which fish or shell are taken and sold in interstate commerce; and
>
> (6) Intrastate lakes, rivers, and streams which are utilized for indu trial purposes by industries in interstate commerce.

40 CFR §§125.1(p), 401.11(l). Based upon the information supplied your letter it appears that your pond is not now navigable waters.

As EPA's Region V advised you by letter of January 28, 1976, artifici ponds built for cooling and located on the property of the utility constitute a acceptable process technology for the control of heat. Whether the pond used for recreation is not relevant to its status as a "cooling pond," as define in 40 CFR §423.11 (m), with regard to the thermal effluent limitations an standards contained in the Steam Electric Power Generating Effluent Lim itation Guidelines and New Source Performance Standards (40 CFR 423, 39 *Fed. Reg.* 36186 *et seq.* Oct. 8, 1974).

Although as a result of *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976), all of the thermal effluent limitations guidelines for the steam electric generating plant category have been remanded to EPA for further consideration and repromulgation, substantial portions of the chemical guideline limitations are still in effect. Chemical discharges into artificial water bodies which constitute navigable waters must comply with limitations on pollutants other than heat.

It is clear, therefore, that if the pond should be opened for use by interstate travelers for recreational (or other) purposes the pond would become navigable waters. Thereafter any introduction of pollutants into the pond would constitute a "discharge of pollutants" pursuant to Section 502(12) of the Federal Water Pollution Control Act, which would be subject to NPDES permit requirements under Section 402 of the Act. The only pertinent requirements under the effluent limitations guidelines would be those relating to chemicals. Other limitations might eventually be imposed under other regulating provisions, such as Sections 303 and 307 of the Act. Of course, if you limit use of the pond to Indiana residents only, then the pond would not be covered by our regulatory definition of "navigable waters."

It must be again pointed out that any change in the effluent limitation guidelines, either through further court action or on the Agency's initiative, could possibly alter the classification of the Gibson cooling pond for regulatory purposes.

If you feel that any further clarification is necessary or if there are any questions or comments, please do not hesitate to contact my office.

DETERMINATION OF JURISDICTION
UNDER CLEAN WATER ACT
(33 U.S.C. 1344)

MADRONA MARSH
Torrance, California

14 June 1982

Description

1. Madrona Marsh is located in the city of Torrance, California, approximately two and one half miles east of the Pacific Ocean and 15 miles southwest of the Los Angeles City Civic Center. The boundaries of the Marsh are Monterey Street on the north, Sepulveda Boulevard on the south, Maple Avenue on the east, and Madrona Avenue on the west. The Los Angeles District, Corps of Engineers, has identified nine areas of the Marsh as wetlands on the inclosed map. Area 1 is approximately 14 acres of wetland; areas 2 through 5 total approximately 1 acre; area 6 is approximately 1.2 acres; and areas 7 through 9 comprise approximately 2.7 acres of wetland.

2. Madrona Marsh was, historically, part of the South Torrance oil field, and oil production has continued to the present. A large oil pad with four oil pumps is located adjacent to wetland area No. 1. Several additional pumps are situated at other locations within the site on upland areas. A census of birds taken for the City of Torrance from April 1975 to May 1976 indicated a total of 98 bird species of which 28 species were restricted to the wetlands, 47 species used both wetland and adjacent upland, and 23 species were observed in the upland areas only. No endangered or threatened bird species have been reported, but a white-tailed kite (fully protected) was observed on several occasions during the fall and winter in both wetland and upland areas. Migratory waterfowl use the marsh for a wintering area and a temporary resting and feeding area during migration. These include Mallard, Pintail, Greenwinged Teal, Shoveler, Canvasback, and Ruddy Duck. Other migratory birds reported in the Marsh include the Green Heron, Snowy Egret, Least Bittern, Whimbrel, and Yellowlegs.

3. Madrona Marsh is a seasonal wetland with direct rainfall and a drainage area of approximately 200 acres as its sources of water. At present, most of the water is supplied through a ditch entering the Marsh at the northern end just south of Monterey Street. Another smaller drainage ditch enters from Maple Avenue. The Marsh has no underground water source from springs and is maintained as a wetland during the wet season

due to an impermeable clay soil layer which prevents percolation and, to a lesser extent, transpiration. The surface water which collects during the wet season is not connected with the ground water table, and the marsh has no outlet. As such, it is an isolated wetland.

History

4. A group known as the Friends of Madrona Marsh has been active and successful in having several hundred thousand dollars set aside in the State budget toward acquisition of the Marsh as a wildlife refuge. However, the amount budgeted falls far short of the amount needed to purchase the land. The Torrance Investment Company has proposed a large development project, including residential and office development, for the Marsh and its vicinity.

5. On 27 February 1980 the Los Angeles District Engineer determined that the approximately 18.9 acres described above are wetlands and are subject to the jurisdiction of the Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. sec. 1344. On 13 April 1981 a petition for withdrawal of jurisdiction was filed in the Los Angeles District on behalf of the Pacific Legal Foundation and the Torrance Investment Company. Under the Memorandum of Understanding between the Corps of Engineers and the Environmental Protection Agency, 45 Fed. Reg. 45,018 (2 July 1980), the District Engineer asked the EPA whether it considered the case to be of "special interest" so that the EPA would make the determination of jurisdiction. EPA declined to make the determination.

6. On 14 August 1981 the District Engineer granted the petition for withdrawal of jurisdiction, concluding that "the mere presence and usage of the wetlands in Madrona Marsh by migratory waterfowl is not sufficient to make those wetlands 'part of a chain or connection to the production, movement, and/or use of interstate commerce'." Then, on 11 February 1982, in response to a petition from the Friends of Madrona Marsh under the Corps/EPA MOU, Brigadier General Forest T. Gay, III, Deputy Director of Civil Works, US Army Corps of Engineers, made the following determination:

> Based on the review of this matter by our Office of Chief Counsel, we have determined that a more adequate opportunity for public participation should have been made available before the Los Angeles District Engineer made his determination on the subject issue.

> Therefore, we are requesting our South Pacific Division Engineer to provide such an opportunity, following which he will independently evaluate the supplemented record before formulating his determination on the issue.

7. At my direction, the Los Angeles District Engineer issued a new public notice on 26 March 1982 and received 50 letters and cards in response. I have carefully reviewed these comments as well as the existing administrative record. The following is my independent evaluation and determination pursuant to the Deputy Director's request.

Issue: Jurisdiction

8. Section 404(a) of the Clean Water Act, 33 U.S.C. sec. 1344(a), requires a permit from the US Army Corps of Engineers for the discharge of dredged or fill material into the navigable waters. "Navigable waters" are defined in sec. 502(7) of the Act, 33 U.S.C. sec. 1362(7), as "the waters of the United States, including the territorial seas." The term "waters of the United States" is administratively defined in 33 C.F.R. sec. 323.2(a) to include four specific types of waterbodies, plus a fifth, general category:

> (5) All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce [emphasis added].

9. The same Army regulation elaborates on the preceding definition in a footnote:

> In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." The waters listed in paragraphs (a)(1)-(4) fall within this mandate as discharges into those waterbodies may seriously affect water quality, navigation, and other Federal interests; however, it is also recognized that the

> Federal government would have the right to regulate the waters of the United States identified in paragraph (a)(5) under this broad Congressional mandate to fulfill the objective of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)). Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the Act.

10. The notion that the term "navigable waters" should be given the broadest possible constitutional interpretation comes directly from the legislative history, Conference Report, S. Rep. No. 1236, 92d Cong., 2d Sess. 144, reprinted in [1972] U.S. Code Cong. & Admin. News, p. 3822, and has been adopted by the courts in several cases, including Natural Resources Defense Council, Inc., v. Callaway, 392 F. Supp. 685, 686 (D. D.C. 1975); United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979); Jentgen v. United States, 657 F.2d 1210, 1211 (Ct. Cl. 1981); United States v. Holland, 373 F. Supp. 665, 671 (M.D. Fla. 1974); and United States v. Ashland Oil & Transportation Co., 504 F.2d 1317 (6th Cir. 1974).

11. It is well-established, then, that the limits of jurisdiction under the Clean Water Act are as broad as the limits of the power of Congress under the interstate commerce clause of the Constitution, art. 1, sec. 8, cl. 3. The commerce clause has come to mean that Congress may regulate activiti ? which affect interstate commerce. Percy v. United States, 402 U.S. 146 (1971); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942). In Wickard v. Fillburn, 317 U.S. 111 (1942), the Supreme Court stated:

> [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' 317 U.S. at 125.

Furthermore, in a recent case involving a challenge to the Federal Surface Mining Control and Reclamation Act, the Supreme Court has stated:

> [E]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. Hodel v. Virginia Surface Mining and Reclamation Assn., 101 S. Ct. 2352 (1981).

12. The issue to be determined at Madrona Marsh, then, is whether the degradation or destruction of its approximately 18.9 acres of wetlands would exert a substantial effect on interstate commerce.

Discussion: Jurdisdiction

13. The first effort by Congress to protect migratory birds, under the Migratory Bird Act of 1913 (37 Stat. 847), was invalidated by the courts. United States v. Shauver, 214 F. 154 (E.D. Ark. 1914); United States v. M'Cullaugh, 221 F. 288 (D. Kan. 1915). When these cases were decided, the prevailing rule of law was that wildlife, including migratory birds, is the property of the various states. Geer v. Connecticut, 161 U.S. 519 (1896). However, Geer was overruled in Hughes v. Oklahoma, 441 U.S. 322 (1979), where the Supreme Court held that wild animals (minnows) should be treated like other commodities when they are shipped in commerce.

14. Hughes was presaged by a line of appeals court cases interpreting the Migratory Bird Treaty Act of 1918. 16 U.S.C. secs. 703-711. Provisions of that Act related to when and how migratory birds may be taken, killed, or possessed were passed by Congress under its treaty making power, so they do not necessarily represent an exercise of the commerce power. Missouri v. Holland, 252 U.S. 416 (1920). However, section 4 of the Act, 16 U.S.C. sec. 705, makes it unlawful to ship in interstate commerce any bird taken contrary to the laws of the state or province (of Canada) in which it was taken. This provision was upheld as a valid exercise of Congress' power under the interstate commerce clause in Bogle v. White, 61 F.2d 930 (5th Cir. 1932).

15. Shortly thereafter, regulations under the Act which prohibited the placing of corn near hunting blinds before the season opens in order to lure migratory birds near blinds so that they may be shot, were upheld in Cochrane v. United States, 92 F.2d 623 (7th Cir. 1937), cert. denied, 303 U.S. 636 (1938), and Cerritos Gun Club v. Hall, 96 F.2d 620 (9th Cir. 1938). These cases specifically mentioned the commerce power as a basis for the baiting regulations. Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942), also upheld these regulations under the commerce power, emphasizing the character of hunting as interstate commerce.

16. A more recent case indicates that polluting even a small (10 acres) pond may be a violation of the Migratory Bird Treaty Act. In United States v. FMC Corporation, 572 F.2d 902 (2d Cir. 1978), the Corporation was convicted and fined for releasing a toxic chemical into its holding pond, thereby killing a number of migratory waterfowl. However, the conviction was based on section 2 of the Act (16 U.S.C. sec. 703), which prohibits the killing of migratory or insectivorous birds protected by the Treaty, and not on section 4 (16 U.S.C. sec. 705), which prohibits interstate shipment of any birds killed contrary to state law. Consequently, the case is a treaty power case and of little help in determining the limits of the commerce clause.

17. Another statute in which Congress moved to protect wildlife from acts which, at first blush, would appear to have only local effects, is the Airborne Hunting Act of 1971, 16 U.S.C. sec. 742 j-1. In United States v. Helsley, 615 F.2d 784 (9th Cir. 1979), the defendants were charged with shooting a coyote from an aircraft in violation of the Act. The court found the Act to be a valid exercise of the commerce power, but traced the authority to the Federal power to regulate airspace, which is "... as complete and as valid as the Federal power, to the extent it rests upon the commerce clause, to regulate navigable waters." 615 F.2d at 786. "In passing the Airborne Hunting Act," the court said, "Congress acted with an express purpose to regulate for the safety of the national air space."

18. The Federal power over airspace is all that is necessary to sustain the Airborne Hunting Act, according to the Helsley court, but it went further and commented in dictum:

> Even if we should find it appropriate to ascribe a dominant purpose to the statute and should further conclude that this purpose was to regulate game management (and we neither assert that authority here nor make

> the finding), nevertheless, congressional regulation is not thwarted by arguments that the incidental connection between commerce and the regulation is used merely as an expedient to justify the law. The power to regulate commerce is plenary, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824), and once the power exists it is for Congress, not the courts, to choose the ends for which its exercise is appropriate. 615 F.2d at 787.

This suggests that Congress may regulate the use of the channels of interstate commerce in such a way as to manage and protect migratory birds, but it does not help in defining the geographical limits of those channels. Furthermore, Congress did not, in the Clean Water Act, explicitly attempt to manage or protect migratory birds. Rather, its stated purpose was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. sec. 1251.

Findings: Jurisdiction

19. Besides the use of Madrona Marsh by migratory waterfowl for a wintering area and as a temporary resting and feeding area during migration, two other possible connections to interstate commerce have been raised in response to the District Engineer's public notice. First, there are active oil wells in and near the Marsh area. However, there is no evidence that destruction or degradation of the wetlands would have any significant effect on the operation of these wells. Second, a number of people have commented that interstate travellers frequently visit, study, and enjoy the Marsh. There is no evidence, though, that any of these travellers would alter their interstate travel were the Marsh destroyed or degraded. It seems clear from the public comments that visiting the Marsh is a secondary or even incidental purpose of the visitors' interstate travel. This is quite different from the large-scale, regional, water-related recreation activities which take place at the Indiana lake at issue in United States v. Byrd, above. I find that neither of these two possible connections to interstate commerce is sufficient to support Corps of Engineers jurisdiction under the Clean Water Act.

20. Thus, the pivotal issue for determining Corps of Engineers jurisdiction at Madrona Marsh is whether the destruction or degradation of the Marsh as a wintering area for migratory waterfowl and as a temporary resting and feeding area during their migration would have a substantial effect on interstate commerce.

21. A number of the interstate commerce cases discussed above involve hunting as the commercial activity. For example, Cerritos Gun Club v. Hall, above, involved a challenge to Federal regulations by hunters, who purchase a great deal of ammunition and equipment and who frequently travel in interstate commerce themselves in the pursuit of their sport. The destruction or degradation of the approximately 18.9 acres of wetland in the Madrona Marsh would certainly displace most or all of the game birds which winter or rest and feed there. It may even reduce the total populations of these game species very slightly. However, there is no evidence that any hunting takes places at Madrona Marsh, and I find that the impact of the Marsh on hunting regionally or nationally is insufficient to support Corps of Engineers jurisdiction under the Clean Water Act.

22. Other Clean Water Act cases have supported jurisdiction on the basis of the vital role which many wetlands play in the food chain, and their consequent impact on interstate commerce. For example, in Zabel v. Tabb, 430 F.2d 199, 203-4 (5th Cir. 1970), the court held that "the destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce ... dredge and fill projects are activities which may tend to destroy the ecological balance and thereby affect commerce substantially." Yet, Madrona Marsh is very different from the Florida Gulf estuary at issue in Zabel v. Tabb. It does not serve the important functions of a nursery for commercial fisheries, an enhancer of water quality, or a storm buffer that coastal wetlands serve. While the degradation or destruction of Madrona Marsh would clearly be a loss to the surrounding area in many ways including ecologically, I find that, due to the small size and isolated character of the wetlands located there, such a loss would not have a substantial effect on interstate commerce.

Issue: Public Participation

23. The proposed development of the Madrona Marsh area has been a very controversial one in the city of Torrance and the surrounding area. Of the 50 comments received in response to the District Engineer's 26 March 1982 public notice, five implicitly or explicitly requested a public hearing on the issue. Also, the Deputy Director of Civil Works directed a more adequate opportunity for public participation.

Discussion: Public Participation

24. Normally, jurisdiction is a legal determination which does not involve public participation at the administrative level. It is presumed that Congress involved the public before it defined its jurisdiction in a statute. However, in this case, applying the statutory definition requires a finding of facts by the administrator, and it is appropriate to solicit information from the public in determining actual effects on interstate commerce. For this reason, the public notice solicited public comments.

25. The Corps of Engineers regulation which sets out a policy on public hearings applies, by its terms, only to the consideration of a permit application, not to a determination of jurisdiction. However, I have applied that policy to this issue as well. The policy states: "Requests for a public hearing under this paragraph shall be granted, unless the District Engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing." 33 C.F.R. sec. 327.4(b).

Finding: Public Participation

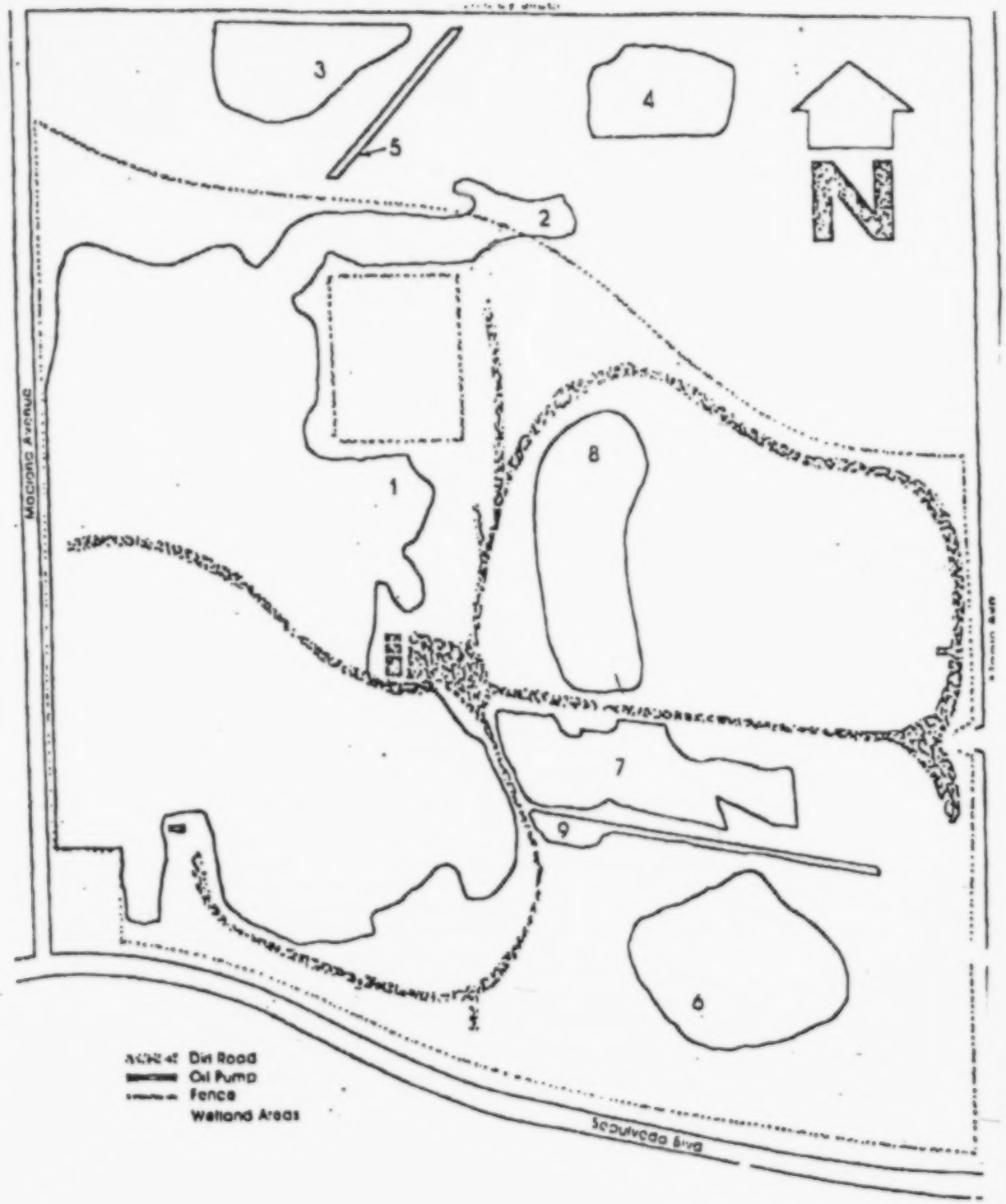
26. The District Engineer has determined that there is no valid interest to be served by a public hearing on this determination. The desirability of preserving the marsh as open space and as an educational area was repeatedly stressed in the written comments and at the public hearing held by the City of Torrance on the zoning of the area. But these indisputably important issues cannot be addressed by the Corps of Engineers unless it has jurisdiction over the area. They are more appropriately addressed by state and local governmental agencies, as they have, indeed, been addressed by the City in its zoning decision. The facts supporting my finding of no substantial effect on interstate commerce are adequately established in the written record, including the public comments, the Environmental Impact Report for the proposed development, and the Corps of Engineers' own biological investigations. Therefore, I find that a public hearing would serve no valid interest at this time and that the opportunity for public participation has been adequate.

Summary

27. I find that the US Army Corps of Engineers has no jurisdiction over the Madrona Marsh area under section 404 of the Clean Water Act because the destruction or degradation of the Marsh would not have a substantial effect on interstate commerce. Furthermore, I find that the opportunity for public participation in this decision has been adequate.

14 JUN 1982
Date

SIGNED
HOMER JOHNSTONE
HOMER JOHNSTONE
Brigadier General, USA
Division Engineer



July 5, 1983

MEMORANDUM

SUBJECT: Clean Water Act Jurisdiction Over Springs in Ash Meadows, Nevada

FROM: A. James Barnes
Acting General Counsel

TO: Frank Covington, Director
Water Management Division
Region 9

Pat Alberico has referred to this office your request for guidance on Clean Water Act (CWA) jurisdiction over isolated springs in Ash Meadows, Nevada. Based on our review of the background materials you provided and the applicable law, it appears that CWA jurisdiction exists over the springs in question.

Facts

Ash Meadows is an oasis area in the Mohave Desert in Nye County, Nevada, near the California border. Because of its geomorphology, this area contains approximately 20 seeps and springs (hereinafter referred to collectively as springs), which discharge a total of approximately 17,000 acre feet of water per year. These springs are fed by underground water. They do not flow beyond the borders of the Ash Meadows area. Those waters and their adjacent marshes are home to a number of endemic plants and animal species. Ash Meadows apparently has the highest density of endemic plants and animals of any locality in the United States. Four species have been listed as endangered species under the Endangered Species Act, and another 14 are candidates for listing. These species, both listed and unlisted, have been extensively studied by a large number of scientists, including many from States other than Nevada.[1] The Devil's Hole spring was declared a disjunct part of the Death Valley National Monument by President Truman in 1952. The Bureau of Land Management maintains public use facilities in the area for recreational visitors. At times in the

[1] By letter of November 8, 1982, the Fish and Wildlife Service provided a list of 50 scientists actively involved in research in Ash Meadows. More than half are from States other than Nevada.

past, water drawn from the springs has been used for agr ture, largely unsuccessfully due to the high mineral conten the water, limitations on available water quantity, and soils. Preferred Equities Corporation, the present owner (significant portion of the water rights for discharges from springs, intends to use the water for a new urban deve ment.

Discussion

Clean Water Act jurisdiction extends, in inland waters, to "waters of the United States" (§ 502(7) of the Act), which defined in the applicable regulations, 40 C.F.R. § 230.3(s).[2] nonnavigable, isolated, intrastate waters, the Ash Meac springs would fit the definition of waters of the United S only if their:

> use, degradation, or destruction . . . would affect or could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign comm
>
> or
>
> (iii) Which are used or could be used for industrial purposes by industries in interstate commerce.

Wetlands adjacent to the springs would have the same juris tional status as the springs themselves.

Whether any particular isolated water, such as the Meadows springs, falls within the regulatory definition wil course, depend upon the facts of the situation. In the pre case, the record indicates that the springs in question have tracted a significant number of scientists from out of Stat study the unusual flora and fauna they support, including eral endangered species. If the springs are degraded or stroyed, they will no longer support the distinctive wild species that attract the scientists. Thus, the springs appea

[2] Identical definitions appear at 40 C.F.R. §§ 122.2 and 233.3, and 33 (§ 323.2(a). Despite some wording changes over the years, intrastate waters by interstate travelers for recreational or other purposes have been incl since the first regulation interpreting "waters of the United States" was p ulgated.

fit the class of waters of the United States described in § 230.3(s)(3)(i), that is, waters the use, destruction, or degradation of which could affect interstate commerce including such waters "which are or could be *used by interstate or foreign travelers for* recreational or *other purposes*." (Emphasis added.)

While there is no case law directly on point, such a finding has support in *United States* v. *Byrd*, 609 F.2d 1204 (7th Cir. 1978) and *Palila* v. *Hawaii Dept. of Land and Natural Resources*, 471 F. Supp. 985 (D. Ha. 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981). The *Byrd* case held that the use of a 2,500-acre lake by out-of-State travelers for recreational purposes could serve as the basis for a finding of CWA jurisdiction.[3] In the *Palila* case, the District Court held that the Endangered Species Act was a proper exercise of the commerce power because, by protecting the natural habitat of endangered species, it "preserves the possibility of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species . . . ."

Given the unusual collection of species directly dependent on the Ash Meadows system of springs, and the intensive study of species and their habitat by a significant number of interstate scientists, and the Federal interest reflected by listing under the Endangered Species Act, an assertion of CWA jurisdiction over the Ash Meadows springs is consistent with the applicable case law interpreting the Commerce Clause, the applicable CWA regulations, and the general purpose of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters (§ 101(a)). Since Congress intended that CWA jurisdiction extend to the maximum

[3] The opinion does not indicate the number of travelers involved.

extent permissible under the Commerce Clause,[4] it follows that there is jurisdiction over the springs in question.[5]

[4] Conference report, 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 327. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978); *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D. D.C. 1975); *Puerto Rico v. Alexander*, 438 F. Supp. 90, 95 (D. D.C. 1977); *Wyoming v. Hoffman*, 437 F. Supp. 114 (D. Wyo. 1977).

[5] While not all the springs in question actually contain listed endangered species, the evidence suggests that the springs are so related that significant alterations to the springs that do not support such species may have an effect on those that do. In addition, the file indicates that the attraction for scientists is not merely the endangered species, but the whole system of endemic species dependent on the collection of springs. Therefore, I consider it appropriate to assert jurisdiction over the collection of springs, not just the specific springs that contain endangered species. Of course, discharges into those springs that do not contain endangered species are probably covered by the Corps of Engineers' nationwide permit for isolated waters, 33 C.F.R. § 330.4. The Corps should be consulted on questions concerning the scope of that permit, and the applicability of its conditions.

EXHIBIT 16

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 12 1985

OFFICE OF GENERAL COUNSEL

MEMORANDUM

TO: Richard E. Sanderson
Acting Assistant Administrator
Office of External Affairs (A-100EA)

FROM: Francis S. Blake
General Counsel (LE-130)

SUBJECT: Clean Water Act Jurisdiction over Isolated Waters

At the section 404 oversight hearings before the Senate Committee on Environment and Public Works on July 15, 1985, Senator Mitchell asked that you confer with the Office of General Counsel concerning a jurisdictional question under the Clean Water Act. Specifically, he asked whether, in asserting jurisdiction over isolated waters on the basis of use by migratory birds or endangered species, EPA required proof that a particular water body was actually used by such birds or endangered species prior to recognizing jurisdiction or whether EPA would be satisfied with evidence that such water body could be so used.

The jurisdiction of the Clean Water Act extends to "waters of the United States." EPA's regulations define waters of the United States to include, inter alia:

> (c) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
>
> (1) Which are or could be used by foreign or interstate travelers for recreation or other purposes;
>
> (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (3) Which are used or could be used for industrial purposes by industries in interstate commerce.

40 CFR §122.2; 40 CFR §233.3.

These regulations implement the Congressional intent that Clean Water Act jurisdiction be asserted to the maximum extent permitted under the Commerce Clause. See, e.g., 1 Leg. Hist., at 178 and 250-51; Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983); Leslie Salt Co. v. Froelke, 578 F.2d 742 (9th Cir. 1978). Therefore, the regulations should be broadly construed, subject of course to the limitations of the Commerce Clause and the actual language of the regulations.

The specific definition of waters of the United States in EPA's regulations has evolved over the years, and it is not necessary to trace here its entire history since passage of the Act in 1972. However, it is relevant to note that in 1979 the agency changed the prior definition, which simply referred to waters used by, inter alia, industry in interstate commerce, to add the phrase "waters the use, degradation, or destruction of which would affect or could affect" commerce.1/ As explained in the preamble, this language was intended to broaden the definition of waters of the United States based on the susceptibility of a stream of use by industries in interstate commerce (44 Fed. Reg. 32854, June 7, 1979).

> [T]he regulations now focus, not on the nature of the stream's users, but on the characteristics of the stream itself, and it will no longer be necessary to show actual industrial use for a stream to fall within the definition.

Id. at 32858.2/

It is now generally accepted that migratory birds and endangered species may be regulated under the Commerce Clause, and that this regulation extends to protection of habitat. See, e.g., Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984); Hughes v. Oklahoma, 441 U.S. 322 (1979); Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942); Palila v. Hawaii Dep't of Land and Natural Resources, 471 F. Supp. 985 (D. Ha. 1979), aff'd 639 F.2d 495 (9th Cir. 1981). The impact on commerce of the destruction of any one isolated wetland need not itself be

---

1/ This change was made after an Office of General Counsel opinion interpreted the old definition as not covering intrastate waters at or below a discharge point where there was no actual use by a downstream industrial user. Decision of the General Counsel No. 73 (Dec. 15, 1978).

2/ In addition, the regulation was reworded to make explicit the long-held view that the waters specifically mentioned were not an exclusive list of waters of the United States.

significant; Congress has the authority to regulate activities which cumulatively could have a significant effect even if a particular individual activity would not. Perez v. United States, 402 U.S. 146 (1971); Wickard v. Filburn, 317 U.S. 111 (1942); U.S. v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979).

With this background, I now turn to the specific question at hand. In simplified terms, the answer is that if the evidence reasonably shows that the waters "are used or would be used" by migratory birds or endangered species, it is covered by EPA's regulation. Of course, as the preamble to the 1979 regulation points out, the clearest evidence would be evidence showing actual use in at least a portion of the stream. In addition, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established and those characteristics make it likely that the waterbody in question will also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used).

Endangered species are, almost by definition, rare. Therefore, in the case of an endangered species, if there is no evidence of actual use of the waterbody or similar waters in the area by the species in question, presumably one would usually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. Again, a specific determination of jurisdiction would turn on the particular facts.

EXHIBIT 17

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 17 1985

OFFICE OF
EXTERNAL AFFAIRS

Honorable George J. Mitchell
United States Senate
Washington, D. C. 20510

Dear Senator Mitchell:

Please find enclosed an EPA Memorandum prepared by our General Counsel in response to your request for information regarding the establishment of jurisdiction over isolated waters on the basis of use by migratory birds or endangered species. As the memorandum states, if evidence reasonably shows that the waters "are used or would be used" by migratory birds or endangered species, it is covered by EPA's regulation. Of course, the clearest evidence would be evidence showing actual use in at least a portion of the stream. In addition, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established and those characteristics make it likely that the waterbody in question will also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used).

Endangered species are, almost by definition, rare. Therefore, in the case of an endangered species, if there is no evidence of actual use of the waterbody or similar waters in the area by the species in question, presumably one would usually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. Again, a specific determination of jurisdiction would turn on the particular facts.

I would add that this has been the consistent interpretation of the Agency since 1979. I hope this information will be helpful to you and the other Subcommittee members. If there is any further information EPA can furnish, please do not hesitate to contact me.

Thank you for your continued interest in and support of the work of this Agency.

Sincerely,

Richard E. Sanderson
Acting Assistant Administrator
External Affairs

Enclosure

EXHIBIT 18

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

20 SEP 1985

MEMORANDUM FOR THE DIRECTOR OF CIVIL WORKS

SUBJECT: Guidance to FOA's on Isolated Wetlands

During the recent Senate oversight hearings on the Section 404 program, questions have been raised about the limits of jurisdiction. Specifically, Senator Mitchell requested specific guidance be provided to the FOA's on the nexus to interstate commerce in isolated wetlands.

As a result of these concerns, EPA council prepared the enclosed memorandum. I concur with the position in this memo. Please distribute this to all FOA's as soon as possible.

Also, please provide me a copy of your transmittal to the FOA's so that I can forward it to the Senate Subcommittee on Environmental Pollution.

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

Enclosure

EXHIBIT 19

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

11 OCT 1985

Honorable George J. Mitchell
United States Senate
Washington, D. C. 20510

Dear Senator Mitchell:

This is in response to your request for a review by my office of the jurisdictional determination made by Galveston District on "Pond 12." We do not intend, and I do not believe you requested us, to perform a legal or formal review, but rather a general overview as discussed on September 18, and during previous oversight hearings. Let me say at the outset, as I have during the oversight hearings, that this Administration has not changed, in any way, policy on determining the limit of Section 404 jurisdiction.

Pond 12 is a 30-acre pond on agricultural land located approximately 60 miles from the Mexican border. This is a type of pond which the Galveston District believes does not and could not support use by migratory birds, or endangered species the alternation or elimination of which could affect interstate commerce. Furthermore, the District determined that Pond 12 still could not support such use when considered cumulatively with potential impacts on other areas including those sharing its characteristics. Therefore, the District did not exert regulatory jurisdiction under Section 404. The Galveston District assures me that they do exert jurisdiction over many isolated waters that support use or could support use by migratory birds or endangered species the alteration or elimination of which would affect interstate commerce.

This jurisdictional determination is consistent with our regulations and the September 12, 1985, EPA legal memorandum. The Corps has been making jurisdictional determinations on isolated wetlands in the same way since publication of our 1977 regulations. The "could be used" criterion has been an integral part of our regulations since 1977 (i.e. "the degradation or destruction of which could affect interstate

commerce"; 33 CFR 323.2(a)(5), 42 Federal Register 138 page 37144). The Corps has traditionally taken a reasonable approach to what constitutes an affect on interstate commerce. This, I believe, is what Mr. Sanderson referred to at the July 15, 1985, oversight hearing, when he said the "rule of reason" should be applied to interstate commerce calls. Finally, when Galveston District made the jurisdictional determination on Pond 12 they were applying the cumulative impact test noted in EPA's September 12, 1985, legal memorandum. That is, the pond is not considered to have the "characteristics" of a water the individual or cumulative use degradation or destruction of which could affect interstate commerce.

Unfortunately, the Galveston District used terminology in their letter to the U.S. Fish and Wildlife Service that described the use by migratory birds and endangered species as "limited" and not "substantial." In fact, I am informed that the occurrence of migratory birds and endangered species was so trivial, that the District did not believe there was an effect on interstate commerce.

Nothing has come to my attention indicating any instances of contravention of laws, regulations, or guidance on this specific jurisdictional determination. Let me reiterate that this Administration has done absolutely nothing to change, in any way, the limit of Section 404 jurisdiction of the Clean Water Act.

Sincerely,

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

EXHIBIT 20

NATIONAL WILDLIFE FEDERATION
1412 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

October 25, 1985

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Robert K. Dawson
Acting Assistant Secretary of
the Army (Civil Works)
2E570 Pentagon
Washington, DC 20310

Re: Notice of Violation of Section 404, Clean Water Act (Commerce Clause Jurisdiction)

Dear Mr. Dawson:

The purpose of this letter is to provide written notice of the alleged violation by the Corps of Engineers of Sections 301(a) and 404 of the Clean Water Act, as amended, 33 USC 1311(a) and 1344. This notice is provided pursuant to Section 505(a) and (b) of the Act, 33 USC 1365(a) and (b).

The Corps has violated Sections 301(a) and 404 by refusing to require permits for the discharge of dredged or fill material in certain so-called "isolated" waters. The ostensible ground cited by the Corps for this refusal is that the discharge activity supposedly will not have an effect on interstate or foreign commerce. In at least one instance the District Engineer, Galveston District, has refused to assert regulatory authority over an isolated waterbody and adjacent wetlands located in Willacy County, Texas, and commonly referred to as Pond No. 12, allegedly because of insufficient jurisdiction under the Commerce Clause (see enclosed copy of September 4, 1985 letter).

The Corps' improperly restrictive interpretation of its constitutional power pursuant to the Clean Water Act is a violation of the Corps' regulations and of the Act itself. The Corps' refusal to regulate destruction of wetlands that are subject to the Clean Water Act also is a violation of the Corps' regulations and the Act.

You may consider this letter to constitute notice for each and every other instance in which the Corps refuses to exercise

its regulatory authority over isolated wetlands for the reasons stated in the September 4, 1985 letter or for related reasons.

Jerry Jackson is the staff attorney representing the National Wildlife Federation on this matter. He can be reached at (202) 797-6827.

Sincerely,

Lynn A. Greenwalt
Vice President
Resources Conservation Department

Enc.
c: Lee M. Thomas, Administrator, USEPA
Dick Whittington, Region VI Administrator, USEPA
Edwin Meese III, U.S. Attorney General
Delta Irrigation District, Edcouch, TX
Alan Allen, Sportsmen's Clubs of Texas, Inc.

EXHIBIT 21

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

8 Nov 85

REPLY TO ATTENTION OF:

DAEN-CWO-N

SUBJECT: EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters

SEE DISTRIBUTION

1. Enclosed is an EPA legal memorandum dated 12 September 1985. This memo is being forwarded pursuant to a commitment made by Mr. Dawson to the Senate Committee on Environment and Public Works, Subcommittee on Environmental Pollution.

2. This legal memorandum was prepared by EPA in response to a specific question on interstate commerce asked by Senator Mitchell during Senate oversight hearings on the Section 404 program.

3. The specific question the memorandum addresses arose during the dialogue at the hearing between Senator Mitchell and Mr. Richard Sanderson, Deputy Assistant Administrator for External Affairs. Senator Mitchell asked the question after Mr. Sanderson listed the following seven factors as indicators of connections to interstate commerce to determine jurisdiction in isolated waters and wetlands:

"1. Waters from which fish or shellfish are or could be taken and sold [in] interstate or foreign commerce;

2. Waters which are or could be used by interstate or foreign travelers for recreational or other purposes;

3. Waters which are or could be used for industrial purposes by industries [in] interstate commerce;

4. Waters used as habitat by birds protected by Migratory Bird Treaties;

5. Waters used as habitat by other migratory birds which cross State lines;

6. Waters which are habitat for endangered species; and

7. Waters used to irrigate crops sold in [interstate] commerce."

DAEN-CWO-N
SUBJECT: EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters

4. Senator Mitchell was confused by Mr. Sanderson's failure to include the words "could be used" in points 4, 5, and 6 dealing with migratory birds and endangered species. After discussion, Senator Mitchell finally stated, "So I think a more proper phraseology here would be to insert in items 4 and 5 after the word "water," the same words which appear in the first three categories, "waters which are or could be used."

5. Mr. Sanderson responded, "I think that is a legitimate interpretation. If I may, I would like to confer with my counsel before I do it, but I will get back to you for the record."

6. The legal memorandum represents EPA's position on the specific point that "are used or could be used" is the appropriate language. This is consistent with our regulations at 33 CFR 323.2(a)(3) and, therefore, should not be viewed as a change in policy.

7. At the hearing, Mr. Dawson also agreed to work with EPA and Interior to develop a national policy statement on the connection to interstate commerce for determinations of Section 404 jurisdiction in isolated waters. Discussions on this policy are still in an early phase.

FOR THE COMMANDER:

Encl

PATRICK J. KELLY
Brigadier General, USA
Deputy Director of Civil Works

DISTRIBUTION:
(See page 3)

EXHIBIT 22

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

OFFICE OF
EXTERNAL AFFAIRS

Mr. Robert K. Dawson
Acting Assistant Secretary
of the Army (Civil Works)
Department of the Army
Pentagon
Washington, D.C. 20310-0103

Dear Bob:

Thank you for sending me a copy of your October 11, 1985 letter to Senator Mitchell concerning Clean Water Act jurisdiction over an isolated water in Texas known as Pond 12. I am not personally familiar with the facts of Pond 12 and am therefore not in a position to question the Galveston District's jurisdictional determination in that case. However, I believe that your letter, if circulated to the field as guidance, could possibly be interpreted inconsistently with EPA's legal memorandum of September 12, 1985. We have both assured Senator Mitchell that EPA's legal memorandum represents the Administration's position on the question it addressed.

The phrase in the Pond 12 letter which could possibly lead to misunderstanding is "use by migratory birds or endangered species the alteration or elimination of which could affect interstate commerce" (emphasis added). While our regulation speaks of isolated waters the use, destruction, or degradation of which could affect interstate commerce, that requirement can be satisfied by showing that a particular waterbody is or could be used by migratory birds or endangered species. The phrase in the Pond 12 letter could be misconstrued as requiring a two-step process for establishing jurisdiction based on migratory birds and endangered species: first a determination that a particular waterbody is or could be expected to be used by migratory birds or endangered species, and then an additional determination of the effect on interstate commerce through the alteration or elimination of such a water (alone or in conjunction with the loss of other waters with the same characteristics).

Such a reading would, of course, be inconsistent with our legal memorandum. That memorandum notes that migratory birds and endangered species may be regulated under the commerce clause. It further notes that the impact on commerce of the destruction of any one isolated wetland need not itself be significant. Thus, since migratory birds and their habitat are properly regulated under the Commerce clause, establishing that a particular water is part of that habitat (through the "is or could be used" test in our memorandum) meets the requirements for Clean Water Act jurisdiction and no further showing is required.

Of course, a two-step process might be appropriate if one were dealing with a use other than migratory birds or endangered species or the specific examples in section 122.2(c)(1)-(3) of our regulations. However, since your Pond 12 memorandum specifically relates to migratory birds and endangered species, any reference to a two step process in that setting would be confusing. I am sure you will do whatever is needed to ensure that there is no misunderstanding on this point.

Sincerely,

Richard E. Sanderson
Deputy Assistant Administrator
for External Affairs

EXHIBIT 23

DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT, CORPS OF ENGINEERS
P. O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

REPLY TO ATTENTION OF

Regulatory Division
Field Monitoring Branch

MAR 12 1986

PUBLIC NOTICE

TO WHOM IT MAY CONCERN: The purpose of this notice is to advise the public about a recent EPA legal memorandum on Clean Water Act jurisdiction over isolated waters and wetlands.

The legal memorandum was prepared by EPA in reponse to a specific question on interstate commerce during Senate oversight hearings on the Section 404 program. A copy of the EPA legal memorandum is available from the U.S. Army Engineer District, Jacksonville, Post Office Box 4970, Jacksonville, Florida 32232-0019, ATTN: Field Monitoring Branch, upon written request.

The specific question the memorandum addresses is the use of migratory birds as a nexus for interstate commerce. The legal memorandum clarified that the phrase "are or could be used" is the appropriate language.

In view of the above, virtually all isolated waters and wetlands have been provided with an interstate commerce connection and therefore those waters and wetlands are subject to Section 404 jurisdiction. Accordingly, prior to discharging any dredge or fill material into these areas, a Department of the Army permit will be required.

Anyone planning to discharge dredge or fill material into a water of the United States including wetland areas is encouraged to check with the applicable Area/Field Office shown on the attached map regarding the need for a Department of the Army permit in view of the EPA legal memorandum's impact on Section 404 jurisdiction.

Any questions regarding the above should be directed to Ronald H. Silver at (904) 791-1679.

FOR THE COMMANDER:

JOHN F. ADAMS
Chief, Regulatory Division

RECEIVED
MAR 14 1986
CITY PANAMA CITY

EXHIBIT 24

28 MAY 1986

Mr. John Meagher
Aquatic Resource Division
Office of External Affairs
Environmental Protection Agency
Washington, D. C. 20460

Dear Mr. Meaghar:

Enclosed is a draft Regulatory Guidance Letter (RGL) on isolated waters that we are proposing to send to our field offices. The RGL builds upon the guidance provided in your legal memorandum of September 12, 1985, adding additional clarification to the concepts of a true "waterbody", and "use" by migratory birds and endangered species. In addition, we have developed a list of waters which generally will not be considered waters of the United States.

Please review the draft RGL and call us to set up a convenient time when we can meet to discuss its contents. We also have sent a copy of the RGL to the Department of Justice and will ask that they participate in subsequent meetings.

Sincerely,

C. G. Goad
Chief, Operations and Readiness Division
Directorate of Civil Works

Enclosure

[illegible] Clean Water Act Jurisdiction [illegible]

1. By letter dated 3 November 1986, we forwarded to you an Environmental Protection Agency (EPA) legal memorandum dated 12 September 1986, which listed seven factors as indicators of connections to interstate commerce to determine jurisdiction in isolated waters and wetlands. This Regulatory Guidance Letter (RGL) has been developed in consultation with the EPA and further clarifies the use of those factors in making jurisdictional determinations.

2. Initially, it is important to establish that an area truly is a waterbody. Water in an isolated depression normally must be sufficiently persistent to exhibit an ordinary high water mark or the presence of wetland characteristics before it can be considered as a waterbody potentially subject to Clean Water Act jurisdiction. This is not intended to exclude automatically isolated areas which, due to climatic factors, are characterized as seasonal wetlands. Evidence concerning the persistence of an area's wetness can be obtained from its history, vegetation, soil, drainage characteristics, uses to which it has been subjected, and weather or hydrologic records. Remember that geographic jurisdiction under the Clean Water Act is dynamic and can be affected by natural, permitted or unregulated hydraulic modification and other changes in water regime.

[illegible] isolated [illegible]

portions of EPA's memorandum concerning [illegible] that be applied in a reasonable manner. Isolated, ephemeral areas of water do not affect commerce as do seasonally dry stream tributaries that are waters of the United States from which pollutants may be washed into receiving waters and across state lines. Instead, an isolated water's effect on commerce must emanate from use of the water in place. The general principle is that an isolated waterbody is a "water of the United States" if the evidence shows that it is used or would be used by migratory birds or endangered species in the ordinary course of events. One should consider whether the characteristics of the waterbody would lead one to expect it to be used as habitat for at least part of the life cycle of migratory birds or endangered species. For example, if one would expect the waterbody to be used with some degree of regularity as a resting or feeding area for birds during migration, that waterbody would be a "water of the United States." On the other hand, if the waterbody is of a type which is so lacking in genuine habitat value that one would expect no more than occasional or accidental use by migratory birds, that waterbody would not be a "water of the United States."

a. The best determination would be made through a showing of "actual use" by migratory birds in at least a portion of the waterbody. However, it is not always possible to show actual use. Therefore, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established, those characteristics make it likely that the waterbody in question will be used by migratory birds.

[illegible] to use by migratory birds.

b. Regarding endangered species, if there is no evidence of actual use of the waterbody or similar waters in the area by the species in question, one should conclude that the waterbody is not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody.

6. Neither the process of excavating material from dry land nor the placement of fill into any waterbody shall in and of itself be considered an interstate commerce nexus, regardless of the origin of the fill, the disposition of the excavated material, the subsequent use of the fill, the source of fuel used during the operation or the business connections of the individual owning, managing or conducting the operation. An interstate commerce connection must be based on the use of the waterbody itself prior to the commencement of an activity subject to Corps regulatory authority.

7. As a general rule the following areas are not considered waters of the United States:

a. Artificial reflecting or swimming pools or other ornamental bodies of water created by excavating and/or diking dry land to retain water for recreational or aesthetic reasons;

b. Artificial lakes or ponds [illegible] land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling treatment, rice growing or aquaculture; and

c. Water filled depressions created incidental to construction activity, and pits excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the operation is abandoned and the resulting body of water becomes "naturalized" and then satisfies one of the seven factors enunciated by EPA.

8. This guidance expires 31 December 1988 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS:

PATRICK J. ELLY
Brigadier General
Deputy Director of Civil Works

[EPA letterhead]

SUBJECT: Clean Water Act Jurisdiction Over Isolated Waters

1. By letter dated 8 November 1985, we forwarded to you an Environmental Protection Agency (EPA) legal memorandum dated 12 September 1985, which listed seven factors as indicators of connections to interstate commerce to determine jurisdiction in isolated waters and wetlands. This Regulatory Guidance Letter (RGL) has been developed in consultation with the EPA and further clarifies the use of those factors in making jurisdictional determinations.

2. Initially, it is important to establish that an area truly is a waterbody. Water in an isolated depression normally must be sufficiently persistent to exhibit an ordinary high water mark or the presence of wetland characteristics before it can be considered as a waterbody potentially subject to Clean Water Act jurisdiction. This is not intended to exclude automatically isolated areas which, due to climatic factors, are characterized as seasonal wetlands. Evidence concerning the persistence of an area's wetness can be obtained from its history, vegetation, soil, drainage characteristics, uses to which it has been subjected, and weather or hydrological records. Remember that geographic jurisdiction under the Clean Water Act is dynamic and can be affected by natural, permitted or unregulated hydraulic modification and other changes [illegible] regime.

3. Once an isolated area has been verified as a true waterbody, then those portions of EPA's memorandum concerning migratory birds and endangered species must be applied in a reasonable manner. Isolated, ephemeral areas of water do not affect commerce as do seasonally dry stream tributaries that are waters of the United States from which pollutants may be washed into receiving waters and across state lines. Instead, an isolated water's effect on commerce must emanate from use of the water in place. The general principle is that an isolated waterbody is a "water of the United States" if the evidence shows that it is used or would be used by migratory birds or endangered species in the ordinary course of events. One should consider whether the characteristics of the waterbody would lead one to expect it to be used as habitat for at least part of the life cycle of migratory birds or endangered species. For example, if one would expect the waterbody to be used with some degree of regularity as a resting or feeding area for birds during migration, that waterbody would be a "water of the United States." One the other hand, if the waterbody is of a type which is so lacking in genuine habitat value that one would expect no more than occasional or accidental use by migratory birds, that waterbody would not be a "water of the United States."

a. The best determination would be made through a showing of "actual use" by migratory birds in at least a portion of the waterbody. However, it is not always possible to show actual use. Therefore, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established, those shared characteristics make it likely that the waterbody in question will be used by migratory birds. Conversely, the waterbody would likely fail the criteria when information exists that the particular waterbody is not used, and the characteristics are not conductive to use by migratory birds.

b. Regarding endangered species, if there is no evidence of actual use of the waterbody or similar waters in the areas by the species in question, one should conclude that the waterbody is not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody.

[Appears to be mis-numbered in original.]

6. Neither the process of excavating material from dry land nor the placement of fill into any waterbody shall in and of itself be considered an interstate commerce nexus, regardless of the origin of the fill, the disposition of the excavated material, the subsequent use of the fill, the source of fuel used during the operation or the business connections of the individual owning, managing or conducting the operation. An interstate commerce connection must be based on the use of the waterbody itself prior to the commencement of an activity subject to Corps regulatory authority.

7. As a general rule the following areas are not considered waters of the United States:
Artificial reflecting or swimming pools or other ornamental bodies of water created by excavating and/or diking dry land to retain water recreational or aesthetic reasons;
Artificial lakes or ponds [illegible] land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling treatment, rice growing or aquaculture; and
Water filled depressions created incidental to construction activity, and pits excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the operation is abandoned and the resulting body of water becomes "naturalized" and then satisfies one of the seven factors enunciated by EPA.

8. This guidance expires 31 December 1988 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS:

PATRICK J. ELLY
Brigadier General
Deputy Director of Civil Works

Path: DOCSOPEN\WASHINGT\08481\54753\000012\3556011.DOC; Doc #: 163482; V. 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 28 1987

OFFICE OF WATER

Mr. John P. Elmore
Chief, Operations and Readiness Division
Directorate of Civil Works
Office of the Chief of Engineers
Washington, D.C. 20314-1000

Dear Mr. Elmore:

Thank you for the opportunity to review your draft Regulatory Guidance Letter (RGL) on Section 404 jurisdiction over isolated waters. Our comments are marked on the enclosed copy of the draft RGL.

In addition to our specific comments, I would like to point out that Paragraph 3 of the draft RGL states as a general principle that "an isolated water body is a "water of the United States" if the evidence shows that it is used or would be used by migratory birds or endangered species in the ordinary course of events." It should be clarified that other commerce clause connections may exist, for example non-avian wildlife with ranges likely to cross State lines, fish harvests that go into interstate commerce, and visits by out-of-State scientists, recreationists, etc. It may be useful to cite the examples used in your regulations (33 CFR §328.3(a)(3)) and preamble (51 Federal Register 41217), although again it should be made clear that these are only examples and not all-inclusive.

In view of EPA's lead responsibility in the area of Clean Water Act jurisdiction, I would like to propose that we prepare and issue this document as joint guidance, as we did with the recent guidance on drainage ditch maintenance under Section 404(f)(1)(C), rather than as a Corps RGL. If you would prefer to issue this as a RGL, we request that you provide us an opportunity to concur on the RGL prior to issuance, after which we would issue identical guidance to our Regions. We believe that joint or parallel issuance would be a step toward clearer and more consistent determinations of Clean Water Act jurisdiction.

We commend the Corps for taking the initiative in developing this guidance. Please contact Suzanne Schwartz of my staff at 382-5043 if you wish to discuss our comments.

Sincerely,

David G. Davis, Director
Office of Wetlands Protection

Enclosure

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314-1000

REPLY TO ATTENTION OF:

CECW-OR

Mr. David G. Davis
Director, Office of Wetlands
Protection
Environmental Protection Agency
401 M Street, SW.
Washington, D. C. 20460

Dear Mr. Davis:

Enclosed is a final version of the regulatory guidance on isolated waters that you reviewed and returned to us by letter dated August 28, 1987. We have adopted all of your suggested changes with two exceptions:

a. We have retained the two sentences in paragraph 3 dealing with the comparison of ephemeral areas and seasonally dry streams which we believe are important concepts; and

b. Restatement of the Preamble language for 33 CFR 328.3(a) (at paragraph 5 of your revisions) is not necessary since that language was derived from the draft regulatory guidance letter (RGL) and has preempted it.

Regarding the comment in the second paragraph of your letter concerning "the general principle" in paragraph 3 of the draft RGL, we have changed the phrase to read "a general principle." We do not believe it is necessary to relist other commerce clause connections since: they are usually much more clear-cut; it is very unlikely that there is any waterbody in the United States that would have one of these other connections and not some type of migratory bird usage; and these other connections are seldom brought into question by the field.

I hope that this revision will be satisfactory and that we can provide this much needed guidance to the field as quickly as possible. Should you have any questions concerning this matter, my staff contact is Robert Pierce (272-1786).

Sincerely,

Peter J. Offringa
Brigadier General, U. S. Army
Deputy Director of Civil Works

Enclosure

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314-1000

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Clean Water Act Jurisdiction Over Isolated Waters

1. This guidance has been developed jointly between the Corps of Engineers and the Environmental Protection Agency (EPA) and further clarifies jurisdiction over isolated waters.

2. Initially, before reaching the commerce connection issue, it is important to establish that an isolated area truly is a waterbody. Water in an isolated depression normally must be sufficiently persistent to exhibit an ordinary high water mark or the presence of wetland characteristics before it can be considered as a waterbody potentially subject to Clean Water Act jurisdiction. This is not intended to automatically exclude isolated areas which, due to climatic factors, are characterized as seasonal wetlands. Evidence concerning the persistence of an area's wetness can be obtained from its history, vegetation, soil, drainage characteristics, uses to which it has been subject, and weather or hydrologic records.

3. Once an isolated area has been verified as a true waterbody, then those portions of EPA's memorandum concerning migratory birds and endangered species must be applied in a reasonable manner. Isolated, ephemeral areas of water do not affect commerce as do seasonally dry stream tributaries that are waters of the United States from which pollutants may be washed into receiving waters and across state lines. Instead, an isolated water's effects on commerce must emanate from use of the water in place. A general principle stated in EPA's memorandum is that an isolated waterbody is a "water of the United States" if the evidence shows that it is used or could be used by migratory birds or endangered species in the ordinary course of events. One should consider whether the characteristics of the waterbody would lead one to expect it to be used as habitat for at least part of the life cycle of migratory birds or endangered species. For example, if one would expect the waterbody to be used with some degree of regularity as a resting or feeding area for birds during migration, that waterbody would be a "water of the United States." On the other hand, if the waterbody is so lacking in habitat value that use by migratory birds has not been observed and would not be reasonably expected, then this factor would not be the basis for asserting jurisdiction over that waterbody.

a. The best determination would be made through a showing of "actual use" by migratory birds in at least a portion of the waterbody. However, it is not always practicable to show actual use. Therefore, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established, those shared characteristics make it likely that the waterbody in question would be used by migratory birds.. Conversely, the waterbody would likely fail the criteria when information exists that the particular waterbody is not used, and the characteristics are not conducive to use by migratory birds.

b. Regarding endangered species, if there is no evidence of actual use of the waterbody or similar waters in the area by the species in question, one may ordinarily assume that the waterbody is not susceptible to use by such species, unless there is clear evidence of potential use of the waterbody by the species.

4. An interstate commerce connection must be based on the use or potential use of the waterbody prior to the commencement of the activity subject to Corps regulatory authority. Neither the process of excavating material from dry land nor the placement of fill into the waterbody shall in and of itself be considered the requisite interstate commerce nexus, regardless of the origin of the fill, the disposition of the excavated material, the source of fuel used during the operation or the business connections of the individual owning, managing or conducting the operation. Where an isolated waterbody does not otherwise have an interstate commerce connection, the fact that the fill is associated with interstate commerce does not establish the requisite interstate commerce connection for the waterbody. However, once the fill is in place, interstate commerce activities which do take place as a result of the fill, establish an interstate commerce connection for the unfilled portion of the waterbody.

Peter J. Offringa
Brigadier General, U. S. Army
Deputy Director of Civil Works

David G. Davis
Director
Office of Wetlands Protection

EXHIBIT 25

United States
Environmental Protection
Agency

Region 10
1200 Sixth Avenue
Seattle WA 98101

Alaska
Idaho
Oregon
Washington

EPA

SEP 08 1989

Reply To
Attn Of: WD-138

Burt Paynter, Chief
Regulatory Branch
Portland District, Corps of Engineers
Post Office Box 2946
Portland, Oregon 97208-2946

RE: June 13, 1989, Letter to Vivian M. Brown (071-0YA-4--008496)
March 3, 1989, Letter to Stan Geiger

Dear Mr. ~~Paynter:~~ Burt

I was recently provided copies of two letters issued by your office regarding Section 404 jurisdiction. The referenced letters deal with jurisdictional questions on isolated and agricultural wetlands, respectively. The guidance and decisions which your office provided in these letters differ significantly from EPA's position and from the guidance provided in the new Federal Manual for Identifying and Delineating Jurisdictional Wetlands (January 1989). I would like to present our interpretation of the jurisdictional status of the sites addressed in the referenced letters. Your views on our interpretation would be appreciated.

The June 13, 1989, letter to Vivian M. Brown concludes that the isolated wetland in question is not a water of the United States. This determination is based on a finding that the wetland "is not used by and is not susceptible to use by migratory waterfowl." We disagree with this finding for several reasons. First, the basis for the finding is an apparent lack of open water, which is considered preferred habitat for waterfowl. In a Memorandum for the Record (MFR) dated June 7, 1989, by Robert Rose, personal communication is cited (John Marshall, Oregon Division of State Lands) indicating he had seen water three feet deep at the site. Even if this was not the case, waterfowl use of emergent marsh is not limited to open water.

Regardless, the commerce nexus at issue is not whether a site is used by migratory waterfowl but by migratory birds. In the same MFR, Mr. Rose indicates that the wetland area is used by sandpipers, which are migratory birds. However, a notation on the MFR dated June 9, 1989, cites the Tabb Lakes decision as a basis for dismissing use by "other migratory birds."

The Tabb Lake decision does not refute the migratory birds commerce nexus. Its decision was quite narrow, pertaining only to the Tabb Lake case

Above all, I would like to encourage a continuing dialogue among our two offices, our Portland Office, and the Oregon Division of State Lands regarding jurisdictional matters. It is extremely important that we present to the regulated public a consistent approach on jurisdiction and a common interpretation of the new jurisdictional method. Toward this end, we would appreciate being consulted on jurisdictional calls similar to those that are the subject of this letter prior to making a final determination.

Sincerely,

William M. Riley, Chief
Water Resources Assessment Section

cc: Dov Weitman, Office of General Counsel
Cliff Rader, OWP
ODSL

EXHIBIT 26

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-OR

24 JAN 1990

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*

1. As a result of the Fourth Circuit Court decision in *Tabb Lakes v. United States*, the enclosed Corps of Engineers/Environmental Protection Agency memorandum was developed to provide guidance on the regulation of isolated waters pending completion of rulemaking on this subject.

2. Questions or comments concerning this guidance should be directed to Dr. John Hall (202) 272-0201 or Mr. Lance Wood (202) 272-0035.

FOR THE DIRECTOR OF CIVIL WORKS:

Encl

JOHN P. ELMORE
Chief, Operations, Construction and
Readiness Division
Directorate of Civil Works

DISTRIBUTION:
(See pg. 2)

United States Environmental Protection Agency

United States Department of the Army

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes* v. *United States*

1. On September 22, 1989, in an unpublished opinion, the United States Court of Appeals for the Fourth Circuit held that the Corps of Engineers may not rely upon memoranda issued on November 8, 1985, and February 11, 1986, by Brigadier General Kelly, then Deputy Director of Civil Works, to assert jurisdiction over isolated waters under section 404 of the Clean Water Act. *Tabb Lakes* v. *United States*, (No. 89-2905, 4th Cir.). This memorandum provides direction on the continued assertion of jurisdiction over isolated waters, as required by 33 CFR 328.3(a)(3), in the wake of the *Tabb Lakes* decision.

2. *Tabb Lakes* focused on an EPA and Corps interpretation of the definition of "waters of the United States" including isolated waters, described at 33 CFR 328.3(a)(3), as follows:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce . . . .

The EPA General Counsel issued guidance on September 12, 1985, interpreting this regulation to include isolated waters which are or could be used as habitat by birds protected by Migratory Bird Treaties, migratory birds which cross state lines, and by endangered species. Brigadier General Kelly adopted this interpretive guidance in the Corps guidance memoranda cited above which were the subject of the *Tabb Lakes* litigation. In *Tabb Lakes*, the Court held that the Corps may not rely on this interpretive guidance in making a jurisdictional determination because the guidance was a substantive rule that should have been, but was not, proposed for public comment prior to its adoption by the agencies. The United States does not intend to appeal the Fourth Circuit's *Tabb Lakes* decision. Instead, the EPA and the Corps intend to undertake as soon as possible an APA rulemaking process regarding jurisdiction over isolated waters. This memorandum provides guidance on how Corps FOAs and EPA Regional Offices should continue to assert CWA jurisdiction over isolated waters in light of the Court of Appeals decision in *Tabb Lakes*, and pending completion of the rulemaking process.

3. The United States believes that the Fourth Circuit's *Tabb Lakes* decision was incorrect and we reserve the right to re-litigate the legal questions decided in the *Tabb Lakes* case in other circuits. Because this decision is not binding on courts outside of the Fourth Circuit, we will not implement the decision outside the area constituting the Fourth Circuit (i.e., outside the states of South Carolina, North Carolina, Virginia, West Virginia, and Maryland).

4. Within the Fourth Circuit, we will follow the holding of *Tabb Lakes*, which was limited to the procedural notice-and-comment issue discussed above. Thus, within the Fourth Circuit, we will not rely upon or cite the above-referenced memoranda in making jurisdictional determinations. However, we will continue to assert jurisdiction, as required by the "waters of the United States" regulatory definition, over all waters, the use, degradation or destruction of which could affect interstate or foreign commerce, as is required by our existing regulations adopted through the Administrative Procedure Act rulemaking process. Corps FOAs and EPA Regions will apply this regulatory definition to each site on a case-by-case basis, and will evaluate all available information in a manner consistent with the language of the regulations and the expressed Congressional intention that Clean Water Act jurisdiction be exercised over all waters to the fullest extent legally permissible under the Commerce Clause of the Constitution.

5. The following applies to CWA jurisdiction over all isolated waters within the Fourth Circuit. The definition of "waters of the United States" at 33 CFR 328.3(a)(3) was promulgated through the APA rulemaking process and remains in full force and effect notwithstanding the *Tabb Lakes* decision. This definition encompasses "isolated" waters, including isolated wetlands, since it specifically cites as examples of jurisdictional waters "...prairie potholes, wet meadows, [and] playa lakes...", all of which are normally "isolated." We fully intend to implement the *Tabb Lakes* decision within the Fourth Circuit; however, we interpret that decision as allowing the Corps and EPA to continue to assert CWA jurisdiction over isolated waters. Accordingly, we expect Corps FOAs and EPA Regional offices within the Fourth Circuit to continue to regulate isolated

waters, including isolated wetlands, as required by existing regulations. Consultation with your Office of Counsel is advisable for doubtful cases.

6. If there are any questions with regards to implementation, Corps Divisions should contact Mr. Lance Wood (CECC-E, (202) 272-0035) or the Chief, Regulatory Branch (CECW-OR, (202) 272-1785). EPA Regions should contact Mr. Steve Neugeboren (Office of General Counsel, (202) 382-7703) or Ms. Suzanne Schwartz (Office of Wetlands Protection, (202) 475-7799).

For the Chief of Engineers:

JOHN P. ELMORE — Date 1/24/90
Chief, Operations, Construction,
and Readiness Division
Directorate of Civil Works

For the Environmental Protection Agency:

DAVID G. DAVIS — Date 1-19-90
Director
Office of Wetlands Protection

EXHIBIT 27

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

[illegible] 01 FEB 1990

Operations, Construction
and Readiness Division
Regulatory Branch

Honorable Owen Pickett
House of Representatives
Washington, D C. 20515

Dear Mr. Pickett:

This is in response to your letter of January 11, 1990, requesting clarification of the U.S. Army Corps of Engineers wetland delineation policy and interpretation of the term "saturation to the surface".

You are correct that an area may be considered "saturated to the surface" even though "the top plane of the soil" is dry. The 1987 Corps of Engineers Wetlands Delineation Manual states clearly that the observations for indicators of saturation to the surface are made within a "major portion of the root zone of the prevalent vegetation". The entire root zone, which is usually within 12 inches of the surface, is the area inspected for evidence of wetland hydrology. The presence of field indicators results from anaerobic conditions (i.e., lack of oxygen) in the upper part of the soil profile. It has been the assumption of both the Corps and the Environmental Protection Agency, based on the technical literature of wetland scientists, and provided for in the various wetland delineation manuals, that capillary fringe allows the upper part of the soil to become saturated above the actual water table. The degree of saturation varies with the texture and structure of the soil, among other factors. Furthermore, where the Corps determines that areas are saturated in the root zone to the extent we identify them as wetlands, the top plane of the soil is saturated, at least briefly during rain events. The top plane of the soil dries quickly because of exposure to the air. However, even where the top plane is dry the saturation in the root zone has a controlling influence on the soil and vegetation.

It is also important to understand that wetland hydrology sufficient to meet the requirements of the 1987 Corps of Engineers Wetlands Delineation Manual, must be present at some time during the growing season. Many wetlands which are inundated during the growing season may be dry at the top plane

of the soil" during the non-growing season. Some saturated systems are virtually never visibly wet at any time at "the top plane of the soil", however, the root zone of the soil is saturated during the growing season, as reflected in the soil profile.

The reliance on the presence of field indicators is the methodology utilized by the Corps nationwide, due to both its technical validity and practical application. Use of field indicators of hydrology is vital to administering the program because inundation or saturation of any particular piece of land is variable and transitory. We use indicators as a means of determining soils are inundated or saturated for the time necessary to be a wetland. We continue to work with the Soil Conservation Service to improve our indicators. Moreover, the Corps continues to provide assistance to the National Academy of Sciences Committee on Wetlands Characterization, which has been tasked with studying the issue of wetland delineation approaches, and looks forward to the Committee's report, which is scheduled for completion on September 30, 1994.

We appreciate your continued personal interest in this important and technically complex issue. If we can provide further information please let us know.

Sincerely,

R. O. Buck
Lieutenant Colonel, U.S. Army
Assistant Director of Civil Works,
Atlantic Region

Retyped Copy of Letter from Colonel Buck to Owen Pickett

02 FEB 1994

Operations, Construction
and Readiness Division
Regulatory Branch

Honorable Owen Pickett
House of Representatives
Washington, D.C. 20505

Dear Mr. Pickett:

This is in response to your letter of January 21, 1994, requesting clarification of the U.S. Army Corps of Engineers wetland delineation policy and interpretation of the term "saturation to the surface".

You are correct that an area may be considered "saturated to the surface" even though "the top plane of the soil" is dry. The 1987 Corps of Engineers Wetlands Delineation Manual states clearly that the observations for indicators of saturation to the surface are made within a "major portion of the root zone of the prevalent vegetation". The entire root zone, which is usually within 12 inches of the surface, is the area inspected for evidence of wetland hydrology. The presence of field indicators results from anaerobic conditions (i.e., the lack of oxygen) in the upper part of the soil profile. It has been the assumption of both the Corps and the Environmental Protection Agency, based on the technical literature of wetland scientists, that capillary fringe allows the upper part of the soil to become saturated above the actual water table. The degree of saturation varies with the texture and structure of the soil, among other factors. Furthermore, where the Corps determines that areas are saturated in the root zone to the extent we identify them as wetlands, the top plane of the soil is saturated, at least briefly during rain events. The top plane of the soil drys quickly because of exposure to the air. However, even where the top plane is dry the saturation in the root zone has a controlling influence on the soil and vegetation.

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We appreciate your continued personal interest in this important and technically complex issue. If we can provide further information please let us know.

Sincerely,

R. O. Buck
Lieutenant Colonel, U.S. Army
Assistant Director of Civil Works,
Atlantic Region

Amicus Curiae Not Available for Filming at This Time